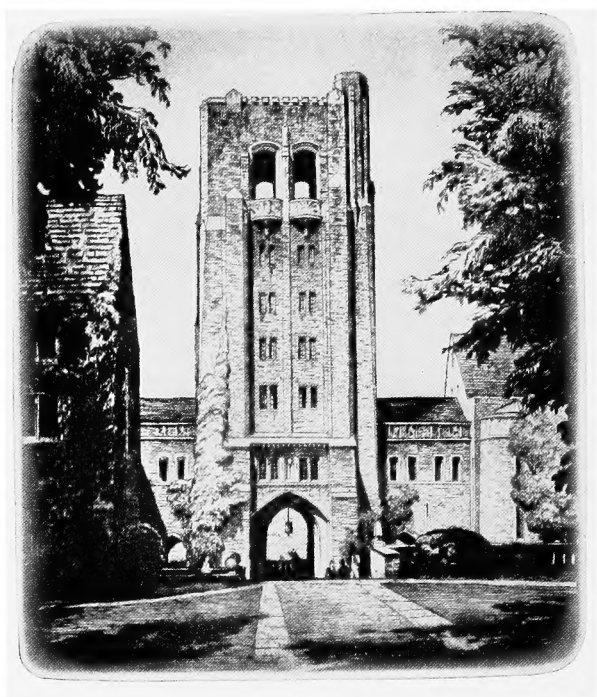


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PARTICULAR ACTIONS AND PROCEEDINGS STATE OF NEW YORK

BY
J. NEWTON FIERO, LL.D.

The earlier four volumes of this set relate to those Actions which are controlled by specific provisions of the Civil Practice Act, or the Consolidated Laws.

This Volume on the contrary takes up seven Actions which are peculiarly of an Equitable nature, and which are grounded in the principles of Equity Jurisprudence rather than in legislative enactments.

EQUITABLE ACTIONS

Accounting	Redemption
Injunction	Reformation
Interpleader	Rescission
Specific Performance	

LAW, PRACTICE AND FORMS

BY
ARTHUR F. CURTIS
OF THE DELHI, N. Y., BAR

VOL. V



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1929

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PREFACE

The present volume marks the culmination of a plan to bring together for convenient reference those PARTICULAR ACTIONS AND PROCEEDINGS which are of outstanding interest to the legal profession.

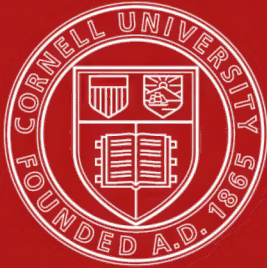
The earlier four volumes relate to those actions which are controlled by specific provisions of the Civil Practice Act or of the Consolidated Laws. This volume, on the contrary, takes up seven actions which are peculiarly of an equitable nature, and which are grounded in the principles of equity jurisprudence rather than in legislative enactments.

While this volume is designed as a fifth volume of FIERO ON PARTICULAR ACTIONS AND PROCEEDINGS, no special discussion of these equitable actions is found in other practice works, and it is hoped it may be a useful supplement to other practice sets.

One cannot compile a work such as this without acquiring an admiration for the principles of equity jurisprudence and their application by equity tribunals. When unfettered by statutory provisions, a court of equity easily finds and follows a road which leads to practical justice. The fundamental rules of equity are readily applied to the complications arising out of a modern business world. One wonders why it is that resort to equity, though available, is many times avoided. If this volume will tend to show the advantages afforded by courts of equity, the labor will not have been in vain.

ARTHUR F. CURTIS.

Delhi, N. Y., May 10, 1929.



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TABLE OF CONTENTS

ACCOUNTING.

ARTICLE I.

In General.

	PAGE
A. Scope of chapter.....	4
B. Common law action of account.....	4
C. Nature of action in equity.....	6
D. Jurisdiction of courts.....	7
E. Necessity of demand before suit.....	8
F. Necessity of balance due plaintiff.....	8
G. Account stated as defense.....	9
1. In general	9
2. What constitutes an account stated.....	10
3. Attack on account stated.....	10
H. Former judicial accounting as defense.....	11
I. Defense of adequate remedy at law.....	12
J. Illegality of transaction.....	13

ARTICLE II.

Relation Authorizing Action.

A. In general	14
B. Partners	15
1. Remedy at law.....	15
2. Action in equity.....	16
3. Effect of account stated.....	18
4. When partnership exists.....	19
5. Illegal partnership	20
6. Stockholders as partners.....	21
7. Dissolution by act of partner.....	21
8. Dissolution by decree of court.....	22
9. Establishment of partnership.....	23
10. Rescission of articles of partnership.....	23
11. Sale of partner's interest rescinded.....	23
12. Fraudulent transfer of partnership property.....	23
13. Distribution of partnership property.....	24
14. Debts due to partner from partnership.....	24
15. Partner wrongfully appropriating assets of firm.....	25
16. Secret profits	26
17. Allowance of damages for breach of agreement.....	27
18. Services and expenses winding up partnership.....	28
19. Capital returned to partners.....	28
20. Allowance of interest to partner.....	29

	PAGE
21. Division of profits or losses.....	29
22. Partnership books.....	30
23. By whom action maintained.....	31
24. Parties defendant.....	32
C. Joint adventurers.....	32
1. In general.....	32
2. Action for dissolution and accounting.....	34
3. Good faith between parties.....	34
4. Parties.....	35
D. Joint tenants or tenants in common.....	36
1. In general.....	36
2. Scope of accounting.....	37
E. Tenants by the entirety.....	38
F. Co-owners of personalty.....	38
G. Trustee and beneficiary.....	40
1. In general.....	40
2. Testamentary trustee.....	41
3. Executor or administrator.....	43
4. Committee.....	44
5. Guardian and ward.....	44
6. Assignee for creditors.....	45
7. Treasurer of fund.....	45
8. Implied trustee.....	46
9. Parties.....	47
H. Principal and agent.....	49
1. In general.....	49
2. Broker.....	51
3. Factor.....	52
4. Attorney-in-fact.....	52
5. Attorney and client.....	53
6. Real estate agent.....	54
I. Corporate organization and management.....	54
1. In general.....	54
2. Corporation to stockholder.....	55
3. Insurance company to policy holder.....	55
4. Promoter.....	55
5. Syndicate.....	56
6. Liquidating officers.....	56
7. Creditors' Committee.....	56
8. Unincorporated association.....	57
9. Cemetery association.....	57
J. Debtor and Creditor.....	57
1. In general.....	57
2. Creditor holding property of debtor.....	58
K. Master and servant.....	59
L. Bailor and bailee.....	60
M. Landlord and tenant.....	61
N. Vendor and purchaser.....	62
O. Royalties.....	62

TABLE OF CONTENTS.

vii

ARTICLE III.

	PAGE
Procedure.	
A. Statute of limitations; laches.....	63
1. Statute applicable.....	63
2. When action accrues.....	64
3. Laches.....	65
B. Pleadings.....	66
1. Complaint.....	66
2. Joinder of causes of action.....	67
3. Variance.....	67
4. Sustaining complaint as an action at law.....	69
5. Counterclaim.....	70
6. Bill of particulars.....	71
7. Form of complaint in accounting between co-tenants.....	72
8. Form of complaint as between partners.....	73
9. Form of complaint in action against agent.....	77
C. Abatement and revival.....	79
D. Examination before trial.....	80
E. Venue.....	81
F. Trial of issues.....	81
1. Issues involved.....	81
2. Court, jury or referee.....	82
3. Form of decision.....	83
G. Interlocutory judgment.....	84
1. In general.....	84
2. Relief granted as of time of trial.....	87
3. Form of interlocutory judgment.....	87
H. Receivership.....	88
I. Proceedings before referee.....	90
1. Procedure before referee.....	90
2. Power of referee.....	91
3. Burden of proof.....	91
4. Misconduct by referee.....	92
5. Report of referee.....	93
J. Final judgment.....	93
1. In general.....	93
2. Form of final judgment.....	94
K. Appeals.....	95
L. Costs.....	96

INJUNCTION.

ARTICLE I.

	PAGE
Introductory.	
A. Nature of action.....	104
B. Jurisdiction of courts.....	105
C. Adequacy of other remedies.....	106

	PAGE
D. Necessity for remedy; irreparable damage.....	108
E. Discretion	109

ARTICLE II.

Enforcement of Contracts.

A. In general	112
B. Analogy to specific performance of contracts.....	114
C. Uncertainty of contract.....	116
D. Inequity; mutuality	116
E. Contract terminated before trial.....	117
F. Performance by plaintiff.....	118
G. Contract for personal service.....	118
1. In general	118
2. Services within rule.....	121
3. Actors, actresses, etc.....	123
4. Athletes	124
5. Necessity of negative covenant.....	125
6. Effect of stipulated damages.....	125
7. Contract illegal, inequitable, lacking mutuality.....	126
8. Performance by plaintiff.....	126
9. Competitor as party defendant.....	127
10. Action by employee.....	127
H. Contract regulating conduct of employee after termination of employment	128
1. In general	128
2. Divulgence of trade secrets.....	129
3. Soliciting customers of former employer; mailing lists.....	131
4. Agreement not to start competing business.....	133
I. Contract against competition on sale of business.....	134
1. General rule	134
2. Reasonableness of restriction.....	136
3. Monopoly	136
4. Damages	136
5. Provision in contract for stipulated damages.....	137
6. What constitutes a violation.....	137
7. By whom enforced.....	138
J. Restrictive covenant as to use of property.....	139
1. In general	139
2. Mandatory injunction for removal of structure.....	140
3. Oral or implied restrictions.....	141
4. General construction of covenants.....	142
5. Necessity of damage to plaintiff.....	143
6. Stipulated damages in lieu of injunction.....	144
7. Lack of uniformity in development.....	144
8. Effect of changed conditions.....	145
9. Effect of violation by plaintiff.....	147
10. Effect of violations by others.....	148
11. Release or waiver of covenant.....	148
12. Acquiescence of plaintiff; waiver; laches.....	149
13. By whom enforced.....	150

TABLE OF CONTENTS.

ix

	PAGE
14. Against whom enforced.....	151
15. Dwellings only.....	152
16. Private dwellings only.....	153
17. All structures forbidden.....	154
18. Offensive business.....	155
19. Apartment houses.....	156
20. Distance of structure from street line.....	156
21. Barns; stables; garages.....	157
K. Leases.....	157
1. In general.....	157
2. Enjoyment of premises by tenant.....	158
3. Use by landlord of part of premises not leased.....	160
4. Improper use of premises by tenant.....	160
5. Assignment of lease or subletting by tenant.....	161
6. Damage to freehold by tenant.....	161
L. Negotiable instruments.....	162
M. Sales.....	163
N. Advertising contracts.....	164
O. Conditions in grant or contract.....	165
P. Municipal contracts.....	166

ARTICLE III.

Protection of Property Rights.

A. Trespass.....	166
1. In general.....	166
2. Mines; quarries; sand banks.....	169
3. Timber.....	170
4. Encroachment.....	170
5. Deposit of materials on private premises.....	172
6. Dumping of sewerage.....	172
7. Construction of railroad on private property.....	173
8. Beach.....	173
9. Roof.....	174
10. Trespass by animals.....	174
11. Damage to personal property.....	174
12. Title of plaintiff.....	175
13. Necessity of establishing title at law.....	175
B. Waste.....	175
C. Nuisance.....	177
D. Spite fences.....	177
E. Blasting.....	178
F. Easements.....	178
1. In general.....	178
2. Right of way.....	179
3. Light, air and view.....	179
4. Sewerage, pipe lines.....	180
5. Bill board.....	180
6. Party wall.....	180

	PAGE
7. Unauthorized use of easement.....	181
8. Illegal attempt to assert easement.....	181
G. Licenses	181
H. Lateral support	182
I. Streets and highways.....	182
1. Obstructions	182
2. Encroachments	184
3. Railroads	185
4. Street railways	187
5. Elevated railroads	189
6. Subways	192
7. Underground conduits.....	193
8. Telephone and telegraph lines.....	193
9. Bridges	193
10. Laying out or improvement of highways.....	194
11. Cutting trees	195
12. Damage to highway.....	195
J. Waters and watercourses.....	196
1. In general	196
2. Diversion	197
3. Pollution	200
4. Dams; flooding.....	203
5. Artificial drainage of surface waters.....	206
6. Obstruction to navigation.....	207
7. Subterranean waters; springs.....	208
8. Lakes and ponds.....	208
9. Ice	209
10. Oyster beds	210
K. Protection from illegal tax.....	211
1. In general	211
2. Illegal assessment	212
3. Execution of illegal tax deeds.....	212
4. Local assessments	213
L. Equity of redemption.....	214
1. Statutory foreclosure of real estate mortgage.....	214
2. Chattel mortgage	215
3. Pledge	217
M. Municipal permits and licenses.....	217

ARTICLE IV.

Enforcement of Corporate Duties.

A. Municipal corporations	218
1. In general.....	218
2. Taxpayers' actions.....	219
3. Title to office.....	220
B. Public utility corporations.....	221
1. Service	221
2. Unreasonable rates.....	223

TABLE OF CONTENTS.

xi

	PAGE
3. Confiscatory rates.....	224
C. Religious corporations.....	225
D. Membership corporations.....	226
E. Private corporations.....	227

ARTICLE V.

Judicial Proceedings.

A. In general	228
B. Action as substitute for appeal.....	232
C. Action as substitute for change of venue.....	233
D. Stay of proceedings contrasted.....	233
E. Restraint of equitable action.....	234
F. Multiplicity of suits.....	235
G. Proceedings in federal courts.....	237
H. Proceedings in courts of other states.....	238
I. Proceedings in foreign countries.....	241
J. Usurious obligation	241
K. Obligation settled	241
L. Counterclaim or set-off.....	243
M. Surrogate's courts	243
N. Inferior local courts.....	245
O. Ecclesiastical courts	245
P. Condemnation proceedings	246
Q. Summary proceedings	246
R. Ejectment	248
S. Enforcement of arbitration.....	248
T. Enforcement of judgment.....	249
U. Use of evidence improperly secured.....	250
V. Parties	251

ARTICLE VI.

Enforcement of Penal Laws: Ordinances.

A. Restraint of officials from enforcing laws.....	251
1. In general	251
2. Trespass by police officers.....	253
3. Sunday laws	255
4. Attack on illegal ordinances.....	255
5. Attack on unconstitutional statute.....	259
B. Injunction as remedy to enforce penal laws.....	259

ARTICLE VII.

Unfair Competition.

A. In general	262
B. Trade-marks and trade-names.....	263
1. Federal and state statutes.....	263
2. Property right in trade-marks.....	264
3. Transfer of trade-mark.....	264

	PAGE
4. Abandonment of trade-mark.....	265
5. What constitutes an infringement.....	265
6. Products not competitive.....	267
7. Injunction as appropriate remedy for infringement.....	268
8. Absence of intention to infringe.....	269
9. Name as trade-mark.....	270
10. Right to use one's own name.....	273
11. Similarity of corporate names.....	275
12. Labels and wrappers.....	277
13. Color schemes.....	278
14. Fraudulent business not protected.....	278
15. Laches.....	279
16. Damages.....	279
17. Parties.....	280
18. Circulars, etc., claiming ownership of trade-mark.....	281
C. Patents.....	281
D. Literary property.....	282
E. Monopolies.....	284
F. Public utility operating without necessary preliminaries.....	285
G. Exclusiveness of franchise.....	286

ARTICLE VIII.

Labor Unions, Strikes, Boycotts, etc.

A. Strike.....	287
B. Injury to employer's property.....	289
C. Breach of contract.....	289
D. Interference with workmen.....	290
E. Picketing.....	291
F. Boycott.....	294
G. Responsibility of union.....	295
H. Injury must be anticipated.....	296

ARTICLE IX.

Protection of Civil Rights.

A. Right of privacy.....	297
1. Civil Rights Law, § 50, right of privacy.....	297
2. Civil Rights Law, § 51, action for injunction and for damages..	297
3. Constitutionality of statute.....	297
4. Rule prior to enactment of statute.....	297
5. Application of statute.....	298
6. Oral consent; estoppel.....	299
7. Damages.....	300
B. Libel and slander.....	300
C. Burial rights.....	301
D. Interference with mail.....	302
E. Exclusion from public place.....	302
F. Matrimonial status.....	302

ARTICLE X.

	Procedure.	PAGE
A.	Limitation of action; laches.....	303
B.	Parties	304
	1. Plaintiff	304
	2. Necessary defendants	305
	3. Proper defendants	306
	4. Municipality	306
	5. State of New York and its officials.....	307
C.	Pleadings	307
	1. Complaint	307
	2. Joinder of causes of action.....	308
	3. Answer	309
	4. Form of complaint for trade-mark violation.....	309
	5. Form of complaint for violation of building covenant.....	313
	6. Form of complaint for trespass on timber lot.....	316
	7. Form of complaint to restrain violation of ordinance.....	319
D.	Preliminary injunctions	321
	1. In general	321
	2. Breach of contract.....	325
	3. Trade-marks and trade-names.....	326
	4. Labor unions; strikes; boycott, etc.....	326
	5. Mandatory injunction	327
	6. When granted pending appeal.....	328
	7. Discretion of court.....	329
	8. Complaint to state cause of action.....	329
	9. Affidavits in support of complaint.....	330
	10. Opposing affidavits, answer containing denials.....	331
	11. Undertaking	332
	12. Notice of application for order.....	332
	13. Order granting preliminary injunction.....	333
	14. Service of order.....	334
	15. Enforcement of order.....	334
E.	Trial of issues.....	336
F.	Relief granted	337
	1. Injunctive relief in general.....	337
	2. Mandatory injunction	338
	3. Damages in addition to injunctive relief.....	340
	4. Legal relief in lieu of equitable relief.....	342
	5. Postponement of operation of injunction.....	344
	6. Enforcement of judgment.....	345
	7. Form of judgment to restrain infringement of trade-name.....	346
	8. Form of judgment to restrain violation of ordinance.....	347
G.	Appeals	347
	1. In general	347
	2. Temporary injunctions	348
H.	Costs	349

INTERPLEADER.**ARTICLE I.****Action of Interpleader.**

	PAGE
A. Civil Practice Act, § 285. Action of interpleader.....	352
B. Civil Practice Act, § 286. Procedure in action of interpleader.....	352
C. Effect of statute.....	353
D. Nature of action.....	354
E. When suit in equity maintainable.....	354
1. In general.....	354
2. Claim by two or more persons.....	355
3. Defendants must claim the same thing.....	357
4. Absence of interest in plaintiff.....	357
5. Hazard to plaintiff in determining rightful claimant.....	358
6. Absence of remedy at law.....	360
7. Absence of collusion.....	360
8. Willingness of plaintiff to make deposit in court.....	361
F. Procedure.....	361
1. Parties.....	361
2. Complaint.....	362
3. Answer.....	362
4. Injunction <i>pendente lite</i>	363
5. Issues and judgment.....	363
6. Costs.....	365
G. Action in nature of interpleader.....	365

ARTICLE II.**Interpleader by Order.**

A. Civil Practice Act, § 287. Interpleader in pending action.....	366
B. History and purpose of statute.....	367
C. When order is granted.....	368
1. In general.....	368
2. Actions to which statute applies.....	369
3. Inability of defendant to make deposit.....	369
4. Necessity that third person have a substantial claim.....	370
5. Conflicting claim must relate to same property.....	372
6. Interest of defendant in controversy.....	372
7. Discretion of court.....	373
8. Collusion.....	374
9. Debtor.....	375
10. Bailee.....	376
11. Bank.....	376
12. Insurance company.....	378
13. Claimants of brokerage commissions.....	379
14. Action of replevin.....	379

TABLE OF CONTENTS.

XV

	PAGE
D. Power of local and inferior courts.....	380
E. Procedure	381
1. Affidavit for order.....	381
2. Notice of application for order.....	382
3. Delay in making application.....	383
4. The order	383
5. Effect of order.....	384
6. Judgment	385
7. Costs	386
8. Form of order of interpleader.....	386
9. Another form of order.....	386
10. Form of supplemental complaint.....	387

REDEMPTION.

ARTICLE I.

The Right of Redemption.

A. In general.	390
B. Jurisdiction of courts.....	390
C. Demand or tender before suit.....	391
D. Real estate mortgage.....	391
1. Protection of equity of redemption.....	391
2. Mortgagee in possession.....	392
3. Defective foreclosure proceedings.....	392
E. Absolute conveyance intended as security.....	394
1. In general.	394
2. Parol evidence to show defeasance.....	396
3. Proof required.	396
4. Release by grantor of equity of redemption.....	400
5. Effect of conveyance by grantee.....	401
6. Rights of mortgagee.....	401
F. Chattel mortgage.	401
G. Pledge	403
H. Order in summary proceedings.....	403

ARTICLE II.

Procedure.

A. Limitation of action.....	404
1. Civil Practice Act, § 46. Action to redeem from a mortgage....	404
2. Earlier statutes.	404
3. The short limitation in subdivision 2.....	405
4. Actions to which statute does not apply.....	405
5. Laches.	406

	PAGE
B. By whom maintained	406
1. In general	406
2. Trustee in bankruptcy, assignee for creditors, receiver, etc.	407
3. Dowress	407
4. Subsequent lienor	407
C. Against whom maintained	409
D. Complaint	410
1. In general	410
2. Form of complaint to redeem from chattel mortgage	410
3. Another form complaint to redeem from chattel mortgage	412
4. Form of complaint in action by wife	414
5. Form of complaint in action to declare a deed as a mortgage	416
E. Venue	418
F. Trial of issues	418
G. Relief granted	419
1. In general	419
2. Accounting between parties	419
3. Rents and profits	419
4. Costs and charges of defendant	421
5. Improvements by defendant	422
6. Time for redemption	422
7. Sale of property	423
8. Money judgment in lieu of redemption	423
9. Re-conveyance to plaintiff	423
10. Redemption of part of premises	424
11. Relief to subsequent lienors	424
12. Relief to part owner of equity	425
13. Form of interlocutory judgment, redemption of chattel mortgage	426
14. Form of interlocutory judgment, action by dowress	427
15. Form of interlocutory judgment, deed as mortgage	428
16. Form of final judgment, redemption of chattel mortgage	429
17. Form of final judgment, deed as mortgage	430
H. Costs	432

REFORMATION.

ARTICLE I.

Introductory.

A. Nature of action	436
B. As an action to determine claim to real property	437
C. Jurisdiction of courts	437
D. Adequate remedy at law	438
E. Relief unnecessary	438
F. Discretion of court	439
G. Court not to make new contract	440

TABLE OF CONTENTS.

xvii

ARTICLE II.

Grounds for Reformation.

	PAGE
A. In general	441
B. Mutual mistake	442
1. In general	442
2. Mistake of draftsman or scrivener	443
3. Mistake of interpreter	444
C. Unilateral mistake	444
1. In general	444
2. Ignorance or negligence of party	446
D. Mistake of one party with fraud of other party	447
1. In general	447
2. Illustrations of fraud	448
E. Mistake of law	451
F. Ambiguity	452

ARTICLE III.

Instruments Reformable.

A. In general	453
B. Deeds	453
1. In general	453
2. Discription of premises	454
3. Acreage	455
4. Estate conveyed	456
5. Assumption of mortgage	457
6. Parties	457
7. Restrictive covenants	458
8. Deed given pursuant to judicial sale	458
C. Executory contracts for sale of lands	458
D. Notes	459
E. Bonds	459
F. Mortgages	460
G. Leases	461
H. Sales	461
I. Construction contracts	462
J. Contracts of suretyship or indemnity	462
K. Insurance policies	463
1. In general	463
2. Life insurance	465
3. Fire insurance	466
4. Burglary or theft insurance	468
5. Liability insurance	469
L. Wills	469
M. Separation agreements	469
N. Illegal verbal contracts	470

ARTICLE IV.

Defenses.

A. Alteration of instrument	470
B. Statute of limitations	470

	PAGE
1. In general	470
2. Laches	471
C. Waiver	473

ARTICLE V.

Procedure.

A. Parties	473
1. Plaintiff	473
2. Defendants	474
3. Purchasers in good faith.	475
B. Complaint	476
1. In general.	476
2. Joinder of causes.	477
3. Amendment	477
4. Form of complaint for reformation of deed.	478
5. Form of complaint for reformation of deed on the ground of deficiency of average.	480
6. Form of complaint for reformation of fire insurance policy.	482
7. Another form of complaint to reform fire insurance policy.	484
C. Counterclaim	486
D. Reformation as defense or counterclaim to another action.	486
E. Trial of issues.	487
F. Temporary injunction.	489
G. Abatement and revival.	489
H. Relief granted	489
1. In general	489
2. Relief in lieu of reformation.	490
3. Form of decision.	490
4. Form of judgment.	493
I. Costs	494
J. Appeals	495

ARTICLE VI.

Evidence.

A. Parol evidence	496
B. Burden of proof.	497
C. Sufficiency of evidence.	497

RESCISSION.

ARTICLE I.

General Principles.

A. Scope of chapter.	503
B. Nature of action.	504
C. Jurisdiction of courts.	505
D. Partial rescission	506

TABLE OF CONTENTS.

xix

	PAGE
E. Necessity of relief.....	506
1. Adequate remedy at law.....	506
2. Illegality appearing on face of instrument.....	508
3. Illegality a matter of record.....	508
4. When legality must be shown by holder before enforcement....	509
5. Mortgages	509
6. Notes and negotiable securities.....	510
7. Municipal bonds	511
8. Special assessments and tax certificates.....	512
9. Fraud	512
10. Usurious loan	514
11. Receipt	515
F. Restoration of benefits received by plaintiff.....	515
1. In general	515
2. Retention of what plaintiff is entitled to in any event.....	516
3. Restoration impossible.....	517
4. Incompetent persons	520
5. Separation agreements	520
6. Usurious obligations	520
7. Offer of restoration in complaint.....	521
8. Extent of restoration.....	523
G. Election of remedies.....	523
1. Remedies available	523
2. What constitutes an election.....	525
3. Effect of election.....	525
H. Waiver, ratification, acquiescence, estoppel.....	526
1. In general	526
2. Knowledge essential	527
3. Delay in asserting claim.....	528
4. Laches	529
5. Retention of benefits from contract.....	530
6. Retaining possession of property.....	531
7. Transfer of contract.....	533
8. Purchase of property subject to mortgage.....	533
9. Insurance policies	533
10. Estoppel	533
I. Parties <i>in pari delicto</i>	534
J. Discretion of court.....	536

ARTICLE II.

Grounds for Rescission.

A. Fraud or misrepresentation.....	537
1. In general	537
2. Misrepresentation not amounting to fraud.....	538
3. Materiality of representations.....	539
4. Falsity of statements.....	540
5. Reliance on representations.....	540
6. Negligence in discovery of fraud.....	540
7. Misrepresentation of law.....	541

	PAGE
8. Statements of future events.....	542
9. Fraud of agent.....	542
10. Condition or value of property purchased.....	543
11. Marketability of title.....	545
12. Insurance policies.....	545
13. Transfer of securities.....	546
14. Judgments.....	546
15. Evidence of fraud.....	547
16. Sufficiency of proof of fraud.....	547
B. Mistake.....	548
1. Mutual mistake.....	548
2. Unilateral mistake.....	550
3. Mistake of law.....	551
C. Duress.....	551
D. Undue influence.....	553
E. Transactions between persons in confidential relations.....	554
1. In general.....	554
2. Attorney and client.....	556
3. Physician and patient.....	556
4. Trustee and <i>cestui que trust</i>	557
5. Promoters and stockholders.....	558
6. Partners.....	558
7. Co-tenant.....	558
8. Husband and wife.....	559
9. Parent and child.....	560
10. Collateral relatives.....	561
F. Incompetency.....	561
G. Infancy.....	563
H. Breach of contract.....	563
1. In general.....	563
2. Oral stipulation not included in written agreement.....	565
3. Contracts for support of grantor.....	566
I. Want of consideration.....	567
J. Inadequacy of consideration.....	568
K. Payment.....	569
L. Usury.....	571
M. Ultra vires.....	571
N. Illegality.....	572

ARTICLE III.

Procedure.

A. Statute of limitations.....	573
B. Parties.....	575
1. Plaintiffs.....	575
2. Defendants, in general.....	577
3. <i>Bona fide</i> purchasers.....	579
C. Pleadings.....	580
1. Essential allegations of complaint.....	580

TABLE OF CONTENTS.

xxi

	PAGE
2. Joinder of causes of action.....	582
3. Variance	583
4. Counterclaim	584
5. Form of complaint in action to cancel a separation agreement..	584
6. Form of complaint in action to cancel contract for sale of land..	586
D. Venue	588
E. Provisional remedies	589
F. Trial of issues.....	590
G. Relief granted	590
1. In general	590
2. Relief in addition to rescission.....	591
3. Relief in lieu of rescission.....	592
4. Relief to defendant.....	593
5. Costs	595
6. Form of judgment.....	595

SPECIFIC PERFORMANCE.

ARTICLE I.

Introductory.

A. In general	603
B. Nature of action.....	604
C. Jurisdiction of courts.....	604
1. Property in foreign state.....	604
2. Foreign corporations	605
3. County courts	606
4. Surrogates' courts	606
5. Inferior courts	606
D. Title of parties to executory contract.....	607
E. Right to specific performance as a defense.....	608

ARTICLE II.

The Right of Action.

A. In general	609
B. Arbitrations	609
C. Insurance	611
D. Partnership agreements	611
E. Formation of corporation.....	612
F. Ante-nuptial contracts	612
G. Advance or payment of money.....	612
H. Services	613
I. Construction contracts	613
J. Miscellaneous contracts	615

	PAGE
K. Contracts relating to real estate.....	616
1. In general	616
2. Action by vendor.....	617
3. Leases	618
4. Mortgages	619
5. Conditions	619
6. Lost or defective grant.....	620
L. Contracts relating to personal property.....	621
1. In general	621
2. Contract to sell.....	621
3. Contract to purchase.....	622
4. Choses in action.....	623
M. Contracts relating to stocks and bonds.....	623
1. In general	623
2. Action against corporation.....	625
N. Contracts for disposition of property of deceased.....	626
1. In general	626
2. Requirements as to contract.....	627
3. Sufficiency of proof.....	628
4. Parties to contract.....	628
5. Mutual Wills	632
O. Illegal contracts	634
P. Unauthorized contracts	635
Q. Contracts difficult of enforcement.....	637
R. Contracts for continuous acts.....	638
S. Verbal contracts	639
1. In general	639
2. Sufficiency of note or memorandum.....	639
3. Fraud	641
4. Effect of "parol evidence" rule.....	644
5. Part performance, in general.....	644
6. Part performance, what constitutes.....	646
7. Part performance, entry into possession, improvements, etc...	647
8. Part performance, payment of consideration.....	650
9. Part performance, services	652
10. Part performance, marriage, separations, etc.....	652
11. Part performance by defendant.....	653
12. Agreement to partition.....	654
13. Agreement to guarantee.....	654
14. Agreement to give or discharge security.....	654
15. Contract for testamentary disposition of property.....	655
16. Pleading of defense.....	655
T. Certainty of contract.....	656
1. In general	656
2. Description of premises.....	657
3. Terms of mortgage or other security.....	658
4. Time of closing title.....	659
5. Terms of lease.....	660

TABLE OF CONTENTS.

xxiii

	PAGE
U. Mutuality	660
1. In general	660
2. Meeting of minds of parties	661
3. Mutuality of remedy	663
4. Unilateral contracts	665
5. Options	666
6. Fraud	668
7. Want of consideration	669
8. Contract cancelled	670
V. Impossibility of performance	670
1. In general	670
2. Defendant unable to furnish marketable title	671
3. Conveyance of property to third person	672
4. Performance conditioned on act of third person	672
5. Contract partly performable	673
6. Performance possible at time of trial	673
7. How question raised	674
W. Discretion of court	675
1. In general	675
2. Relief inequitable	677
3. Mistake, fraud, accident, surprise	678
4. Inadequate consideration	680
5. Prejudice to public interests	681
6. Fiduciaries, incompetents, infants, etc.	681
7. Plaintiff not having acted in good faith	682
8. Change in circumstances after execution of contract	682
9. Laches of plaintiff	684
10. Burden of proof	684
11. Review by Court of Appeals of discretion of lower court	684
X. Adequacy of another remedy	685
Y. Performance by plaintiff	687
1. In general	687
2. Literal performance not required	688
3. When time is of essence	688
4. Law day not fixed in contract	689
5. Excuses for delay	689
6. Extension of time for performance	690
7. Place of performance	693
8. Variance between description in contract and in deed	693
9. Title of vendor not marketable	694
a. In general	694
b. When title of vendor unmarketable	695
c. Title depending on questions of law	697
d. Outstanding incumbrances	699
e. Lis pendens	700
f. Restrictive covenants	701
g. Zoning regulations	701
h. Easements	702

	PAGE
i. Encroachments	702
j. Title from other than vendor	703
k. Title by adverse possession	703
l. Opinions as to marketability	704
m. Waiver of objection to title	705
n. Title marketable at time of trial	705
10. Payment of purchase price	706
11. Title insurance	707
12. Notice of vendor of defect of title or deed	707
13. Refusal to accept deed	708
14. Tender of performance	708
Z. Default of defendant	710
AA. Premises of infants or incompetents	711
1. Civil Practice Act, § 1384. Jurisdiction of supreme court over contracts of incompetents	711
2. Civil Practice Act, § 1385. Action to compel conveyance	711
3. Civil Practice Act, § 1386. Who may maintain action	712
4. Civil Practice Act, § 1387. Judgment; effect thereof	712

ARTICLE III.

Procedure.

A. Parties to action	712
1. Plaintiffs generally	712
2. Defendants generally	713
3. Personal representative of vendor	715
4. Personal representative of vendee	715
5. Heirs, devisees	716
6. Grantee	717
7. Assignee of vendee	718
8. Wife or widow	720
10. Purchaser at judicial sale	721
B. Pleadings	721
1. Essential allegations of complaint	721
2. Performance by plaintiff	722
3. Authority of agent signing contract	723
4. Absence of adequate remedy at law	723
5. Matters relating to alternative relief	724
6. Prayer for relief	724
7. Variances and amendments	725
8. Joinder of causes of action	726
9. Bill of particulars	726
10. Form of complaint in an action by vendor of real estate	727
11. Another form in action by vendor	728
12. Form of complaint in action to compel performance of contract relating to testamentary disposition of property	729
13. Form of complaint in action to compel transfer of stock	732
C. Lis pendens	733

TABLE OF CONTENTS.

XXV

	PAGE
D. Temporary injunction	734
E. Place of trial	735
F. Jury trial	735
G. Submission of controversy	736
H. Limitation of action; laches	737
1. Statute applicable	737
2. When cause of action accrues	738
3. Laches	738
I. Appeals	740
1. Civil Practice Act, § 586. Rights of parties after appeal from judgment in favor of owner in certain real property actions . .	740
2. Civil Practice Act, § 597. Security to stay execution on judgment or order directing conveyance	740
3. Effect of statutes	741
4. Action of appellate court	741

ARTICLE IV.

Relief Granted.

A. In general	742
B. Directions as to specific performance	743
1. In general	743
2. Form of deed	744
3. Performance by infants or incompetents	745
4. Allowance of offsets against purchase price	746
5. Payment or assumption of incumbrances	746
6. Partial performance	747
C. Incidental relief	748
D. Specific performance as incidental relief in another form of action . .	749
E. Rescission of contract on denial of relief	749
F. Damages in lieu of specific performance	749
1. In general	749
2. Impossibility of performance	751
3. Jury trial of issues	752
4. Pleading and proof of legal cause of action	753
5. Amount of damages	754
6. Recovery of deposit by purchaser	755
7. Lien for damages or deposit	756
G. Abatement of purchase price	757
1. In suit by purchaser	757
2. In suit by vendor	758
H. Accounting for damages sustained from delay	759
1. In general	759
2. Value of use and occupancy	760
3. Interest to vendor	761
4. Interest to purchaser	762
5. Depreciation in property	762

	PAGE
6. Accounting by purchaser for use of premises.....	763
7. Accounting for proceeds of sale to third person.....	763
I. Judicial sale	763
J. Injunction	764
K. Vendor's wife refusing to sign deed.....	764
L. Enforcement of decree.....	766
M. Modification of decree.....	767
N. Costs	767
O. Forms of judgments.....	769
1. Judgment in action by vendor of real estate.....	769
2. Another form in action by vendor.....	771
3. Action to enforce agreement for testamentary disposition.....	772
4. Action to compel transfer of stock.....	773



PARTICULAR ACTIONS AND PROCEEDINGS

VOLUME FIVE.

EQUITABLE ACTIONS

ACCOUNTING.

ARTICLE I.

In General.

	PAGE
A. Scope of chapter.....	4
B. Common law action of account.....	4
C. Nature of action in equity.....	6
D. Jurisdiction of courts.....	7
E. Necessity of demand before suit.....	8
F. Necessity of balance due plaintiff.....	8
G. Account stated as defense.....	9
1. In general	9
2. What constitutes an account stated.....	10
3. Attack on account stated.....	10
H. Former judicial accounting as defense.....	11
I. Defense of adequate remedy at law.....	12
J. Illegality of transaction.....	13

ARTICLE II.

Relation Authorizing Action.

A. In general	14
B. Partners	15
1. Remedy at law.....	15
2. Action in equity.....	16
3. Effect of account stated.....	18
4. When partnership exists.....	19
5. Illegal partnership	20
6. Stockholders as partners.....	21
7. Dissolution by act of partner.....	21
8. Dissolution by decree of court.....	22
9. Establishment of partnership.....	23
10. Rescission of articles of partnership.....	23
11. Sale of partner's interest rescinded.....	23
12. Fraudulent transfer of partnership property.....	23
13. Distribution of partnership property.....	24
14. Debts due to partner from partnership.....	24

	PAGE
15. Partner wrongfully appropriating assets of firm.....	25
16. Secret profits	26
17. Allowance of damages for breach of agreement.....	27
18. Services and expenses winding up partnership.....	28
19. Capital returned to partners.....	28
20. Allowance of interest to partner.....	29
21. Division of profits or losses.....	29
22. Partnership books	30
23. By whom action maintained.....	31
24. Parties defendant	32
C. Joint adventurers	32
1. In general	32
2. Action for dissolution and accounting.....	34
3. Good faith between parties.....	34
4. Parties	35
D. Joint tenants or tenants in common.....	36
1. In general	36
2. Scope of accounting.....	37
E. Tenants by the entirety.....	38
F. Co-owners of personalty.....	38
G. Trustee and beneficiary.....	40
1. In general	40
2. Testamentary trustee	41
3. Executor or administrator.....	43
4. Committee	44
5. Guardian and ward.....	44
6. Assignee for creditors.....	45
7. Treasurer of fund.....	45
8. Implied trustee	46
9. Parties	47
H. Principal and agent.....	49
1. In general	49
2. Broker	51
3. Factor	52
4. Attorney-in-fact	52
5. Attorney and client.....	53
6. Real estate agent.....	54
I. Corporate organization and management.....	54
1. In general	54
2. Corporation to stockholder.....	55
3. Insurance company to policy holder.....	55
4. Promoter	55
5. Syndicate	56
6. Liquidating officers	56
7. Creditors' Committee	56
8. Unincorporated association	57
9. Cemetery association	57
J. Debtor and Creditor.....	57
1. In general	57
2. Creditor holding property of debtor.....	58

	PAGE
K. Master and servant.....	59
L. Bailor and bailee.....	60
M. Landlord and tenant.....	61
N. Vendor and purchaser.....	62
O. Royalties	62

ARTICLE III.

Procedure.

A. Statute of limitations; laches.....	63
1. Statute applicable.....	63
2. When action accrues.....	64
3. Laches	65
B. Pleadings	66
1. Complaint	66
2. Joinder of causes of action.....	67
3. Variance	67
4. Sustaining complaint as an action at law.....	69
5. Counterclaim	70
6. Bill of particulars.....	71
7. Form of complaint in accounting between co-tenants.....	72
8. Form of complaint as between partners.....	73
9. Form of complaint in action against agent.....	77
C. Abatement and revival.....	79
D. Examination before trial.....	80
E. Venue	81
F. Trial of issues.....	81
1. Issues involved	81
2. Court, jury or referee.....	82
3. Form of decision.....	83
G. Interlocutory judgment	84
1. In general	84
2. Relief granted as of time of trial.....	87
3. Form of interlocutory judgment.....	87
H. Receivership	88
I. Proceedings before referee.....	90
1. Procedure before referee.....	90
2. Power of referee.....	91
3. Burden of proof.....	91
4. Misconduct by referee.....	92
5. Report of referee.....	93
J. Final judgment	93
1. In general	93
2. Form of final judgment.....	94
K. Appeals	95
L. Costs	96

ARTICLE I.

IN GENERAL.

A. Scope of chapter.

It is proposed in this chapter to discuss the equitable action of Accounting, an action maintained in the Supreme Court, the primary object of which is to compel the defendant to render an account to the plaintiff. In some cases similar relief may be secured in a special proceeding, but this chapter does not cover such special proceedings. No attempt is made to discuss the accounting of executors, administrators, testamentary trustees, or similar fiduciaries, as conducted in Surrogate Courts. The accounting of a general assignee,¹ of a committee,² of a receiver of a corporation,³ and of a receiver of a judgment debtor appointed in supplementary proceedings,⁴ are treated in other places in *Fiero on Particular Actions and Proceedings*. Likewise, the right of a stockholder to require the officers of a corporation to account for their wrongful acts, is reserved for another chapter.⁵ When an accounting is directed as incidental relief in an action primarily maintained for another purpose, the subject is treated in connection with the special action primarily involved. Thus, in an action for Partition, an accounting between the tenants of the property may sometimes be directed.⁶ An accounting may also be had in a judgment creditor's action.⁷

B. Common law action of account.

Although at this time an action to compel the rendering of an account seems purely of equitable cognizance, it is of historical interest that the common law courts were not entirely devoid of power in such matters. The common law action was always of limited scope, but lay to require bailiffs and receivers of property to account therefor, and in some cases the remedy was permissible as between co-tenants or part-

1. Fiero, Vol. 2, page 1030.

2. Fiero, Vol. 1, page 335.

3. Fiero, Vol. 1, page 932.

4. Fiero, Vol. 4, page 3373.

5. Fiero, Vol. 1, page 784.

6. See, Fiero, Vol. 3, page 2633.

7. Fiero, Vol. 2, page 1852. And see
Loos v. Wilkinson, 113 N. Y. 485.

ners.⁸ It was recognized by the Revised Statutes in 1830,⁹ the statute permitting an "action of account" in favor of one joint tenant or tenant in common against his co-tenant for receiving "more than his just proportion."¹⁰

The action proceeded much the same as an action in equity. Upon the preliminary trial a judgment was rendered directing the defendant to account, and reference was made to "auditors" to take the account.¹¹ The auditors had the power to compel the parties to account and to be examined under oath.¹² Upon the report of the auditors final judgment was rendered.

The very few decisions relating to this form of action indicate that it was very rarely utilized in this State. It was said, "This is one of the most difficult, dilatory and expensive actions that ever existed, and it has long since given place to other remedies."¹³ On the other hand, at an early date, it was said, "I have not been able to discern any good reason why that action has so totally fallen into disuse."¹⁴ A party prosecuting the remedy was held to the strict practice prevailing under the common law system.¹⁵ While no statute will be found abolishing this form of action, it has become obsolete.

8. Courts of law have concurrent jurisdiction with the court of chancery in the examination of accounts between parties. Where a party has elected a court of law as the forum for the examination of the accounts, after a decision in such court of law, he cannot come into a court of equity and have the same accounts re-examined. *Southgate v. Montgomery*, 1 Paige 41.

Partners.—The action could not be maintained when there were more than two partners or when they were not engaged in a mercantile business. *Appleby v. Brown*, 24 N. Y. 143; *McMurray v. Rawson*, 3 Hill 59. See also, *Ludington v. Taft*, 10 Barb. 447. But see, *Kelly v. Kelly*, 3 Barb. 419, holding it was not necessary that the partners be engaged in a mercantile pursuit.

9. 1 Rev. St. 750, section 9.

10. This provision of the Revised Statutes is now incorporated in section 532 of the Real Property Law, but its language has been modified so as to eliminate any mention of the action of "account."

11. Auditors changed to referees.—In the revision of 1830 the revisers attempted to simplify the proceedings in an action of account by substituting referees for auditors. *Appleby v. Brown*, 24 N. Y. 143.

12. *Duncan v. Lyon*, 3 Johns. Ch. 351.

13. *McMurray v. Rawson*, 3 Hill 59.

14. *Duncan v. Lyon*, 3 Johns. Ch. 351.

15. *McMurray v. Rawson*, 3 Hill 59.

C. Nature of action in equity.

An action of accounting is a suit whereby the plaintiff invokes the equitable powers of the court to require the defendant to account to the plaintiff as to his transactions in matters in which they are jointly interested. The origin of the remedy is due to necessity, that when ignorance or fraud or other causes prevent men from properly stating and taking their accounts so as to protect their just rights, a court of equity will intervene to take and state them.¹⁶ Equity assumes that the claims between the parties have no independent existence, but are so connected that all that either party can claim is the ultimate balance.¹⁷ Equitable jurisdiction of the controversy has been placed upon three grounds, viz: (1) The complicated character of the accounts; (2) the need of a discovery; (3) the existence of a fiduciary or trust relation.¹⁸ Modern practice eliminates the first ground, for long accounts can now be readily sent to a referee for determination whether the action is legal or equitable in its nature.¹⁹ Likewise, the need of a discovery no longer requires the intervention of equity, for an examination of a party before trial can be had in an action at law. But the third ground—the jurisdiction of equity over fiduciaries—remains, and forms the basis of the equitable jurisdiction of the action.²⁰ Hence follows the general rule that an action of accounting does not lie unless the parties stand in a fiduciary relation.²¹

16. Crosby v. Watts, 41 Super. Ct. (9 J. & S.) 208.

17. Wilson v. Mallett, 6 Super. Ct. (4 Sandf.) 112.

18. Marvin v. Brooks, 94 N. Y. 71; Getman v. Dorr, 28 Misc. 654, 59 N. Y. Supp. 788; Mabie v. Seymour, 80 Misc. 280, 140 N. Y. Supp. 1097, affirmed without opinion, 158 App. Div. 952, 143 N. Y. Supp. 1129; Ellas v. Lockwood, Clarke, 311.

19. "The mere fact that an account in issue is complicated, does not in all cases oblige the court to take equitable jurisdiction; it is a matter largely within the discretion of the court, and if, considering all the circumstances, it appear that it would be of very great

inconvenience and possible oppression to the defendant, the plaintiff will be remitted to his action at law." Uhlman v. New York L. Ins. Co., 109 N. Y. 421. See also, Parker v. John Pullman & Co., 36 App. Div. 208, 56 N. Y. Supp. 734.

20. Marvin v. Brooks, 94 N. Y. 71; Getman v. Dorr, 28 Misc. 654, 59 N. Y. Supp. 788; Mabie v. Seymour, 80 Misc. 280, 140 N. Y. Supp. 1097, affirmed without opinion, 158 App. Div. 952, 143 N. Y. Supp. 1129; Pine Cliffs Farms v. Collier, 92 Misc. 269, 156 N. Y. Supp. 293.

21. See, *infra*, II-A, Relation authorizing action—In general.

The action is contractual and transitory.²² An action of accounting between partners is "an action on contract" within the meaning of subdivision 2 of section 266 of the Civil Practice Act relating to counterclaims.²³ An action between the members of a partnership engaged in dealing in real estate is not, however, an action affecting real estate within the meaning of section 120 of the Civil Practice Act relating to *lis pendens*.²⁴

D. Jurisdiction of courts.

The Supreme Court, as the successor of the Court of Chancery, has jurisdiction of an action of accounting. The Supreme Court of this State has jurisdiction of an action to compel the execution of a trust under a foreign will, where the trustees and *cestui que trust* are all residents of this State.²⁵ An accounting may be directed by the courts of this State, although it involves real property situated in another State.²⁶ The action may be maintained in the courts of this State, although the defendant is a resident of a foreign nation and the cause of action arose there, if some of the property involved is in this State.²⁷

County Courts have not such general jurisdiction of equitable causes as will permit them to determine an action brought primarily to secure an accounting. The City Court of New York has no power to hear an action of this character.²⁸ A Surrogate's Court has jurisdiction of a special proceeding maintained for the accounting of an executor, administrator, or other similar fiduciaries, but has no power to determine an equitable action of accounting. It may, however, order the liquidation of a partnership or joint adventure, as an incident to the allowance or rejection of a claim by the surviving member thereof to share as a creditor in the assets of the estate of the deceased member.²⁹

22. *Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219.

23. *Petrakion v. Arbeely*, 23 Civ. Proc. R. 183, 26 N. Y. Supp. 731.

24. *Rosen v. Rosen*, 126 Misc. 37, 212 N. Y. Supp. 405.

25. *Jones v. Jones*, 8 Misc. 660, 60 State Rep. 429, 30 N. Y. Supp. 177.

26. *Jones v. Jones*, 8 Misc. 660, 60 State Rep. 429, 30 N. Y. Supp. 177;

Reading v. Haggin, 58 Hun 450, 35 St. Rep. 585, 12 N. Y. Supp. 368.

27. *Yucatan v. Argumedo*, 92 Misc. 547, 157 N. Y. Supp. 219.

28. *Cukor v. Rothman*, 78 Misc. 588, 139 N. Y. Supp. 1015, reversed 140 N. Y. Supp. 113; *Lasky v. Coverdale*, 84 Misc. 34, 145 N. Y. Supp. 994.

29. *Raymond v. Davis*, 248 N. Y. 67.

E. Necessity of demand before suit.

Where it was the duty of the defendant to remit to the plaintiff upon the receipt of moneys, a demand is not necessary before the commencement of the action.³⁰ And where the relations of the parties are such that an account must be rendered, and equity has jurisdiction because of the nature of the rights involved, a prior demand for an account is probably not a necessary condition to the maintenance of the action.³¹ But, where the court is asked to enforce performance of an agreement for an accounting simply, a breach of the agreement and the necessity for a judicial direction that it be performed are essential elements of the cause of action.³²

F. Necessity of balance due plaintiff.

It is not essential to the maintenance of an action of accounting that the plaintiff claim, or that it be established, that the desired accounting will exhibit a balance due to the plaintiff.³³ The decree in the suit may properly adjudge that the plaintiff is indebted to the defendant.³⁴ The right of a *cestui que trust* to maintain an action for an accounting is beyond question, even though it does not appear that as a result thereof anything will be found due.³⁵ An accounting

30. *Haebler v. Luttgen*, 2 App. Div. 390, 73 St. Rep. 376, 37 N. Y. Supp. 794, affirmed without opinion, 158 N. Y. 693.

31. *New York L. Ins. Co. v. Hamilton*, 52 Misc. 189, 102 N. Y. Supp. 771; *Livingston v. Taft*, 10 Barb. 477. Compare, *Magauren v. Tiffany*, 62 How. Pr. 251.

32. *New York L. Ins. Co. v. Hamilton*, 52 Misc. 189, 102 N. Y. Supp. 771. See also *Burke v. Rector Churchwarden, etc.*, 64 Misc. 380, 119 N. Y. Supp. 362.

33. *Frethy v. Durant*, 24 App. Div. 58, 48 N. Y. Supp. 839; *Jordan v. Underhill*, 91 App. Div. 124, 86 N. Y. Supp. 620; *Consolidated Fruit Jar Co. v. Wisner*, 110 App. Div. 99, 97 N. Y. Supp. 52, affirmed without opinion, 188 N. Y. 624; *Seaward v. Davis*, 133 App. Div. 191, 117 N. Y. Supp. 468,

modified, 198 N. Y. 415; *Potomac Ins. Co. v. Kelly*, 173 App. Div. 791, 160 N. Y. Supp. 161; *Ins. Co. of N. A. v. Whitlock*, 216 App. Div. 78, 214 N. Y. Supp. 697; *Hamilton v. Taber*, 34 Misc. 75, 69 N. Y. Supp. 434, reversed on other grounds, 60 App. Div. 293, 70 N. Y. Supp. 118; *United States Trust Co. v. Greiner*, 124 Misc. 458, 209 N. Y. Supp. 105, affirmed 215 App. Div. 659, 212 N. Y. Supp. 931; *Reading v. Haggin*, 58 Hun 450, 35 St. Rep. 585, 12 N. Y. Supp. 368; *Crosby v. Watts*, 41 Super Ct., (9 J. & S.) 208; *Second Nat. Bank v. Kean*, 203 N. Y. Supp. 909.

34. *Scott v. Pinkerton*, 3 Edw. 70. And see, *infra*, III-J, Final judgment.

35. *Seaward v. Davis*, 133 App. Div. 191, 117 N. Y. Supp. 468, modified 198 N. Y. 415; *Hamilton v. Taber*, 34 Misc. 75, 69 N. Y. Supp. 434, reversed

between partners, or persons standing in a similar relation, may be had for the purpose of establishing their mutual accounts of liabilities, regardless of the ultimate result of the controversy.³⁶ The complaint need not set forth the sums which the plaintiff claims to be due.³⁷ An answer merely denying that moneys are due to the plaintiff, does not tender an issue.³⁸

G. Account stated as defense.

1. In general.

An account stated may be a good defense to an action of accounting.³⁹ If the defendant has voluntarily prepared and rendered to the plaintiff an account or statement of his transactions, and the plaintiff has, either expressly or by implication, acquiesced in its correctness, a court of equity will not ordinarily direct any further accounting.⁴⁰ The function of the equitable action is the settlement of open, unadjusted accounts between the parties. If the parties have settled and adjusted their several claims and agreed upon a balance, for which a note is given, the holder may bring an action at law upon the note, but cannot maintain an equitable action for an accounting.⁴¹ A final settlement between former partners and an assignment by one to the other of all interest in the firm assets and business, in the absence of fraud or mistake, bars an action for accounting.⁴²

on other grounds, 60 App. Div. 293, 70 N. Y. Supp. 118.

36. *Scott v. Pinkerton*, 3 Edw. 70. "The theory of the suit is that the plaintiff and defendant have had transactions together, in respect to which the plaintiff is entitled to an accounting and asks judgment for an accounting. Under such circumstances, when unsettled transactions have occurred between parties, it is the right of either one, whether a creditor or a debtor, who deems he has rights to be declared or enforced, to bring an action for an accounting, so that an account may be legally stated and taken that shall be binding upon the parties, and by which present and future difficulties may be avoided." *Crosby v. Watts*, 41 Super Ct. (9 J. & S.) 208.

37. *Petrakion v. Arbeely*, 23 Civ. Proc. R. 183, 26 N. Y. Supp. 731.

38. *Second National Bank v. Kean*, 203 N. Y. Supp. 909.

39. *Wahl v. Barnum*, 116 N. Y. 87; *Sherburne v. Taft*, 142 N. Y. 619; *Mersereau v. Bennett*, 62 Misc. 356, 115 N. Y. Supp. 20; *Morrison v. Chapman*, 63 Misc. 195, 116 N. Y. Supp. 522; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Weeks v. Hoyt*, 5 Hun 347.

40. *Spier v. Hyde*, 32 Misc. 26, 66 N. Y. Supp. 120; *Morrison v. Chapman*, 63 Misc. 195, 116 N. Y. Supp. 522; *Weeks v. Hoyt*, 5 Hun 347.

41. *Sherburne v. Taft*, 49 St. Rep. 771, 20 N. Y. Supp. 757, affirmed 142 N. Y. 619.

42. *Sprague v. Beekman*, 8 Weekly Dig. 362.

2. What constitutes an account stated.

An account stated may arise from an express agreement between the parties; or it may arise from implication, as where one aware of his rights accepts a statement rendered by another under such circumstances that he may be said to have acquiesced in its correctness.⁴³ The fact that a statement of the account has been rendered by the plaintiff and accepted by the defendant without objection, may be evidence of an account stated, but is not necessarily conclusive.⁴⁴ If the statement fraudulently conceals the true situation, or even where it contains mistakes, a party having no knowledge of the facts, is not bound thereby.⁴⁵ The fact that one misled by a fraudulent statement was guilty of negligence in not discovering his rights, does not necessarily deprive him of the right to question the statement.⁴⁶

Monthly statements sent by a stockbroker to his client, when received without objection, may constitute an account stated, and, as such, may bar an action for an accounting.⁴⁷ But, if the account fraudulently conceals items of which complaint is made, the client is not bound as to such items.⁴⁸ Or, if the broker never made actual transactions but merely offset the orders of the client against the orders of other customers, the transactions are fictitious, and statements showing the pretended transactions are fraudulent and not binding on the client.⁴⁹

3. Attack on account stated.

In the absence of duress, fraud or mistake, an account stated will not be opened and investigated in an action for

43. *Robinson v. Miller*, 210 App. Div. 450, 206 N. Y. Supp. 248; *Pfizer v. Wasserman*, 77 Misc. 641, 138 N. Y. Supp. 566; *Lavers v. Hutton*, 122 Misc. 516, 203 N. Y. Supp. 235.

44. *Jordan v. Underhill*, 91 App. Div. 124, 86 N. Y. Supp. 620; *Potomac Ins. Co. v. Kelly*, 173 App. Div. 791, 160 N. Y. Supp. 161; *Haight v. Haight & Freese Co.*, 46 Misc. 501, 93 N. Y. Supp. 934, affirmed 112 App. Div. 475, 98 N. Y. Supp. 471, affirmed without opinion, 190 N. Y. 540.

45. *McDonough v. Paine*, 212 App. Div. 572, 209 N. Y. Supp. 440.

46. *Ins. Co. of N. A. v. Whitlock*, 216 App. Div. 78, 214 N. Y. Supp. 697.

47. *Robinson v. Miller*, 210 App. Div. 450, 206 N. Y. Supp. 248; *Pfizer v. Wasserman*, 77 Misc. 641, 138 N. Y. Supp. 566; *Lavers v. Hutton*, 122 Misc. 516, 203 N. Y. Supp. 235.

48. *McDonough v. Paine*, 212 App. Div. 572, 209 N. Y. Supp. 440.

49. *Haight v. Haight & Freese Co.*, 112 App. Div. 475, 98 N. Y. Supp. 471, affirmed without opinion, 190 N. Y. 540.

an accounting.⁵⁰ But, if the defendant asserts as a defense that the accounts between the parties have been settled and adjusted, the plaintiff is entitled to prove, not only that no settlement was made, but also that the pretended settlement was fraudulent, incorrect and made under a mutual mistake, or any other fact that would indicate its invalidity.⁵¹ Even a general release is not binding where the relation between the parties was fiduciary and material facts were not disclosed at the time of the execution of the instrument.⁵² The plaintiff will be allowed to show the invalidity of the account stated without the service of a reply, or the amendment of his complaint.⁵³

An account which has been settled and stated, will be opened in equity only on clear proof that the settlement was induced by fraud, mistake, or manifest error, and never where it appears that at the time of the settlement, both parties had full knowledge of the facts in relation to the charges, and after mutual concessions, agreed that the account should be a stated account.⁵⁴

H. Former judicial accounting as defense.

If a fiduciary voluntarily petitions for the settlement of his accounts, the proceedings bar an action by the *cestui que trust* for the same relief.⁵⁵ The decision of the referee in a former action of accounting is not a bar to a subsequent action, where final judgment on the decision has never been entered.⁵⁶ In an action of accounting, all sums received by the defendant after the commencement of the action may be included in the account taken;⁵⁷ but, in case they are not so included, the plaintiff is not precluded by the judgment from commencing another action for their recovery.⁵⁸ If the parties agree that the accounting shall extend only to the time

50. *Harley v. Eleventh Ward Bank*, 76 N. Y. 618; *Wahl v. Barnum*, 116 N. Y. 87; *Bullock v. Boyd*, 2 Edw. Ch. 293; *Rutty v. Person*, 52 N. Y. Super. Ct. (20 J. & S.) 329.

51. *Radley v. Connell*, 79 Hun 603, 61 St. Rep. 487, 29 N. Y. Supp. 813.

52. *Ins. Co. of N. A. v. Whitlock*, 216 App. Div. 78, 214 N. Y. Supp. 697.

53. *Bartlett v. Bunn*, 28 St. Rep. 373, 8 N. Y. Supp. 155.

54. *Rutty v. Person*, 52 N. Y. Super. Ct. (20 J. & S.) 329.

55. *Groshon v. Lyon*, 16 Barb. 461.

56. *Derby v. Yale*, 13 Hun 273.

57. *Tyler v. Willis*, 35 Barb. 213, 13 Abb. Pr. 369. See, *infra*, III-I, Proceedings before referee.

58. *Tyler v. Willis*, 35 Barb. 213, 13 Abb. Pr. 369.

of the commencement of the suit, it cannot thereafter be claimed that the suit is a bar to an accounting of items accruing between the commencement of the action and the rendering of judgment.⁵⁹ An action for an accounting of the "rents and profits" of certain real estate is not necessarily a bar to an action for an accounting of the "use and occupancy" thereof.⁶⁰

A decree made by a surrogate on the accounting of a personal representative concludes a party only as to those matters embraced in the account.⁶¹ If the accounting before the surrogate is based on the inventory of the estate, the decree made by him may not be conclusive as to items not included in the inventory.⁶²

I. Defense of adequate remedy at law.

Fundamentally, equity assumes jurisdiction of a controversy only when there is no adequate remedy at law. This limitation of equitable jurisdiction, however, receives but little consideration in actions of accounting. Equitable relief is allowed when the parties to the action stand in certain fiduciary relations; in which cases the courts generally take the position that there is no adequate remedy at law. If the required fiduciary relation does not exist, the accounting is denied; and it matters little to the disappointed litigant whether the denial of relief is based on the absence of the proper relation between the parties, or on the theory that he has a remedy in an action at law. It will usually be found that, where equity declined to accept jurisdiction on the ground that the relation was not one justifying the action, the plaintiff actually had an adequate remedy in a legal action.⁶³ On the other hand, cases will be found where equity has determined the controversy, the parties standing in the proper relation for an exercise of equitable jurisdiction, although it could be said that a concurrent remedy at law existed.⁶⁴ In the cases where jurisdiction is declined, it may frequently be pointed out that the plaintiff has an ade-

59. *Bonn v. Steiger*, 2 State Rep. 90.

60. *Landes v. Landes*, 129 Misc. 10, 220 N. Y. Supp. 469.

61. *Frethy v. Durant*, 24 App. Div. 58, 48 N. Y. Supp. 839.

62. *Frethy v. Durant*, 24 App. Div. 58, 48 N. Y. Supp. 839.

63. *Moore v. Coyne*, 113 App. Div. 52, 98 N. Y. Supp. 892; *Skilton v. Payne*, 18 Misc. 332, 42 N. Y. Supp. 111.

64. *Fur & Wool Trading Co. v. Fox*, 245 N. Y. 215; *Factors F. Ins. Co. v. Whilden*, 92 Misc. 558, 156 N. Y. Supp.

quate remedy at law. On the other hand, the fact that there is no remedy at law or that only incomplete relief is available in a legal action, impels a court to exercise equitable powers.⁶⁵

It is a historical fact that, in many cases, there was formerly a remedy in an action at law to require a party to account.⁶⁶ Hence, it is stated in some of the cases that courts of equity have concurrent jurisdiction with courts of law in matters of account.⁶⁷ When equitable jurisdiction has once been established, that jurisdiction is not generally lost by any enlargement of the common law jurisdiction in actions at law.⁶⁸

It is the general rule in equitable actions that, if the defendant does not plead want of equitable jurisdiction or does not allege that the plaintiff has an adequate remedy at law, he cannot insist at the trial that an action in equity will not lie.⁶⁹ But, in an action of accounting, the objection of the defendant is that the plaintiff has no remedy in equity, rather than that there is an adequate remedy at law; and the defendant is permitted to urge his objection although he has not averred in his answer that there exists an adequate remedy in an action at law.⁷⁰ A separate defense alleging that the plaintiff has an adequate remedy at law is insufficient, where the complaint sets out a cause wholly equitable in its nature and in which only equitable relief can be granted.⁷¹

J. Illegality of transaction.

If a partnership was formed for an illegal purpose, as an illegal combination in restraint of trade,⁷² or to defraud the creditors of one of the parties,⁷³ equity will not intervene

362; *Woolson Spice Co. v. Columbia Trust Co.*, 110 Misc. 687, 181 N. Y. Supp. 149. Est. Co. 21 App. Div. 163, 47 N. Y. Supp. 500.

65. *McKenzie v. Wappler Elec. Co.*, 215 App. Div. 336, 213 N. Y. Supp. 389. 70. *Skilton v. Payne*, 18 Misc. 332, 42 N. Y. Supp. 111.

66. See, *supra*, I-B, Common law action of account. 71. *Ward v. Chelsea Exch. Bank*, 153 App. Div. 638, 138 N. Y. Supp. 720; *Woolson Spice Co. v. Columbia Trust Co.*, 110 Misc. 687, 181 N. Y. Supp. 149.

67. *Hawley v. Cramer*, 4 Cow. 717.

68. *Hawley v. Cramer*, 4 Cow. 717.

69. *Watts v. Adler*, 130 N. Y. 646; *Pam v. Vilmar*, 54 How. Pr. 235. See, also, *Schuetz v. German-American Real* 72. *Keene v. Rent*, 25 Week. Dig. 235. 73. *Marsh v. Pierce*, 21 Week. Dig. 51.

to compel a distribution of the fruits of the illegal transaction. Likewise, if property is transferred for the purpose of defrauding the creditors of the transferor, he will not be permitted to maintain an action in equity to compel the transferee to account for the proceeds thereof.⁷⁴ But a corporation which has unlawfully made contracts to practice law may, nevertheless, require an attorney, which it has employed to conduct legal proceedings, to account for moneys coming into his hands.⁷⁵

ARTICLE II.

RELATION AUTHORIZING ACTION.

A. In general.

An action in equity is not maintainable merely for the collection of a debt or the recovery of property to which the plaintiff may be entitled. Relief of this character may be secured in an action at law.⁷⁶ To justify the action it must appear that there is a fiduciary or trust relation between the parties;⁷⁷ and that by virtue of such relation the defendant has, or has had, possession of money or other property belonging to the plaintiff.⁷⁸ But, when a situation meeting the test is shown, a court of equity takes the position

74. Sweet v. Tinslar, 52 Barb. 271.

75. United States Title Guaranty Co. v. Brown, 166 App. Div. 688, 152 N. Y. Supp. 470, affirmed without opinion, 217 N. Y. 628.

76. Hathaway v. Clendenning Co., 135 App. Div. 407, 119 N. Y. Supp. 984; Low v. Swartout, 171 App. Div. 725, 157 N. Y. Supp. 1067; Boiardi v. Marden, O. & H. Corp., 194 App. Div. 307, 185 N. Y. Supp. 331, appeal dismissed 230 N. Y. 607.

77. Uhlman v. New York L. Ins. Co., 109 N. Y. 421; Schantz v. Oakman, 163 N. Y. 148; Rivelson v. Silverstein, 65 App. Div. 614, 72 N. Y. Supp. 594; Moore v. Coyne, 113 App. Div. 52, 98 N. Y. Supp. 892; Seaward v. Davis, 133 App. Div. 191, 117 N. Y. Supp. 468, modified 198 N. Y. 415; Hathaway v. Clendenning Co., 135 App. Div.

407, 119 N. Y. Supp. 984; Low v. Swartout, 171 App. Div. 725, 157 N. Y. Supp. 1067; Boiardi v. Marden, O. & H. Corp. 194 App. Div. 307, 185 N. Y. Supp. 331, appeal dismissed, 230 N. Y. 607; Frank Gilbert Paper Co. v. Prankard, 204 App. Div. 83, 198 N. Y. Supp. 25; Getman v. Dorr, 28 Misc. 654, 59 N. Y. Supp. 788; McCullough v. Pence, 85 Hun 271, 32 N. Y. Supp. 986, 66 St. Rep. 470; Kosovits v. New York First Hungarian St. Stephen's Roman Catholic, etc., Soc. 130 N. Y. Supp. 72; Clements v. W. S. Cooper Co., 136 N. Y. Supp. 93.

78. Schantz v. Oakman, 163 N. Y. 148; Reading v. Haggin, 58 Hun 450, 35 St. Rep. 585, 12 N. Y. Supp. 368; Kosovits v. New York First Hungarian St. Stephen's Roman Catholic, etc., Soc. 130 N. Y. Supp. 72.

that the owner is entitled to be informed as to how the fiduciary has performed his duties, and assumes jurisdiction to compel him to reveal his dealings.⁷⁹ In the absence of the necessary relation, the mere fact that the accounts between the parties are complicated does not justify an accounting in equity.⁸⁰ Equity does not assume jurisdiction of every action in which an accounting is necessary to determine the rights and liabilities of the respective parties.⁸¹

B. Partners.

1. Remedy at law.

The proper form of action for the settlement of partnership accounts is an action in equity for an accounting.⁸² It may be stated as a general rule that an action at law does not lie by one partner against his co-partner to impose a liability arising out of the partnership property or accounts.⁸³ It is, perhaps, unnecessary to add that to the general rule there are some exceptions. All general rules seem to have exceptions. The general rule, when stated so as to include some exceptions is: An action at law for the recovery of the interest of one partner against the other cannot be sustained, unless there has been an agreement as to the amount due, or an account stated and balance struck and agreement to pay, express or implied.⁸⁴

79. *Marvin v. Brooks*, 94 N. Y. 71; *Schantz v. Oakman*, 163 N. Y. 148; *Frethy v. Durant*, 24 App. Div. 58, 48 N. Y. Supp. 839; *Woodbridge v. First Nat. Bank*, 45 App. Div. 166, 61 N. Y. Supp. 258, affirmed, 166 N. Y. 238; *Pine Cliffs Farms v. Collier*, 92 Misc. 269, 156 N. Y. Supp. 293; *Reading v. Haggin*, 58 Hun 450, 35 St. Rep. 585, 12 N. Y. Supp. 368; *Clements v. W. S. Cooper Co.*, 136 N. Y. Supp. 93; *Second Nat. Bank v. Kean*, 203 N. Y. Supp. 909.

80. *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421; *Clements v. W. S. Cooper Co.*, 136 N. Y. Supp. 93.

81. *McCullough v. Pence*, 85 Hun 271, 32 N. Y. Supp. 986, 66 St. Rep. 470.

82. See the following paragraph.

83. *Goldsticker v. Goldsticker*, 106

Misc. 182, 174 N. Y. Supp. 257; *Arona Holding Corp. v. Fraser*, 125 Misc. 333, 209 N. Y. Supp. 756; *Still v. Holbrook*, 23 Hun 517; *Williams v. Lindblom*, 68 Hun 173, 52 State Rep. 78, 22 N. Y. Supp. 673, affirmed on opinion below, 142 N. Y. 682; *Niven v. Spickerman*, 12 Johns, 401; *Watts v. Adler*, 13 State Rep. 553; *Rogers v. Rogers*, 1 Super. Ct. (1 Hall) 434.

84. *Lasky v. Coverdale*, 84 Misc. 34, 145 N. Y. Supp. 994; *Goldsticker v. Goldsticker*, 106 Misc. 182, 174 N. Y. Supp. 257; *Smith v. Fitchett*, 56 Hun 473, 31 State Rep. 608, 10 N. Y. Supp. 459; *Josias v. Sugar Products Co.*, 169 N. Y. Supp. 887, affirmed without opinion, 187 App. Div. 905, 174 N. Y. Supp. 908; *Sherburne v. Taft*, 49 State Rep. 771, 20 N. Y. Supp. 757, affirmed 142 N. Y. 619.

If by positive agreement or by acquiescence, an "account stated" has been adopted as the measure of the liability of the partners, *inter se*, an action at law may be brought on such account. Under such circumstances, equity will not assume jurisdiction of the controversy.⁸⁵ If it is claimed that the account stated is not binding, as where it has been procured by fraud or has been adopted by mistake, an action in equity may be necessary to avoid the effect of the account.

An action at law may also be brought, where the only controversy is with respect to the damages which the plaintiff has sustained by reason of the breach of the partnership agreement by the defendant.⁸⁶ Where a partner assumes to dissolve the partnership before the end of the term agreed upon, or where, prior to the commencement of the partnership, he disaffirms his contract, he is liable for damages to be recovered in an action at law.⁸⁷

Before the codification of procedure, if the defendant relied upon partnership transactions as a defense to an action at law, it was necessary for him to go into chancery, and in his suit the action at law would be restrained until the adjustment of the partnership affairs.⁸⁸ Present practice, however, permits the interposition of an equitable defense to an action at law.⁸⁹

A common law action for an "account" was once recognized. Such an action was allowed against one person having property of another, where the parties were in confidential relations. An action by one of two mercantile partners against the other was thus permitted. But, without any legislative fiat abolishing the common law action, it has fallen in disuse, and may be said now to have become obsolete.⁹⁰

2. Action in equity.

An action in equity for an accounting is the proper method for the settlement of partnership accounts.⁹¹ As a practical

85. See, *infra*, II-B-3, Effect of account stated; and, *supra*, I-6, Account stated as a defense.

86. *Crownshield Trading Corp. v. Earle*, 200 App. Div. 10, 192 N. Y. Supp. 304; *Wills v. Simmonds*, 8 Hun 189.

87. *Armstrong v. Rickard*, 199 App. Div. 880, 192 N. Y. Supp. 502.

88. *Hammond v. Terry*, 3 Lans. 186; *Rogers v. Rogers*, 1 Super. Ct. (1 Hall) 434.

89. Civ. Prac. Act, § 262.

90. *Appleby v. Brown*, 24 N. Y. 143; *Kelly v. Kelly*, 3 Barb. 419; *Duncan v. Lyon*, 3 Johns. Ch. 351. See, *supra*, I-B, Common law action of account.

91. *Appleby v. Brown*, 24 N. Y. 143;

proposition it is the other remedy available for the settlement of contested accounts.⁹² The remedy is available although it may appear that a balance is due to the defendant, not to the plaintiff.⁹³ An accounting may be had in equity, although the partnership is still a going concern and dissolution thereof is not sought.⁹⁴ The action may be maintained, although one of the members died after the dissolution,⁹⁵ or although there are no partnership assets remaining for distribution.⁹⁶ The fact that there are outstanding claims due to or from the firm, or that there is property still owned by the firm, does not forbid an accounting for the purpose of adjusting the accounts of the partners.⁹⁷ Although, upon the dissolution of the firm, one of the members is alone authorized to liquidate the partnership affairs, he may maintain an action for an accounting and thereby compel a co-partner to pay over any balance that may be established against him, or, in case of a deficiency in the firm assets, to contribute his proportion of what is required to discharge the debts of the firm.⁹⁸

It has been thought that, if the firm has made an assignment for the benefit of creditors, one partner cannot maintain a suit for the purpose of adjusting the accounts of the

Marvin v. Brooks, 94 N. Y. 71; *Watts v. Adler*, 130 N. Y. 646; *Conger v. Judson*, 69 App. Div. 121, 74 N. Y. Supp. 504; *Germann v. Jones*, 220 App. Div. 5, 221 N. Y. Supp. 32; *Pine Cliffs Farms v. Collier*, 92 Misc. 269, 156 N. Y. Supp. 293; *Arona Holding Corp. v. Fraser*, 125 Misc. 333, 209 N. Y. Supp. 756; *Pine v. Ormsbee*, 2 Abb. Pr. N. S. 375; *Ludington v. Taft*, 10 Barb. 447; *Petrakion v. Arbeely*, 23 Civ. Proc. R. 183, 26 N. Y. Supp. 731; *Skidmore v. Collier*, 8 Hun 50; *Smith v. Fitchett*, 56 Hun 473, 31 State Rep. 608, 10 N. Y. Supp. 459; *Niven v. Spickerman*, 12 Johns. 401; *Watts v. Adler*, 13 State Rep. 553.

Option to purchase interest of partner.—Where the partnership articles provide that upon dissolution, either party may make in writing an offer of the price at which he will buy the interest of the other or sell to the

other his interest at the same price, the defendant who has failed to exercise the option cannot invoke the agreement to defeat a suit to wind up the partnership. *Lent v. Montross*, 8 St. Rep. 831, 26 Week. Dig. 404.

92. See, *supra*, B-1, Remedy at law.

93. *Scott v. Pinkerton*, 3 Edw. 70; *White v. White*, 58 Super. Ct. (26 J. & S.) 333, 33 State Rep. 801, 11 N. Y. Supp. 575, modified 124 N. Y. 468.

94. *Sanger v. French*, 157 N. Y. 213; *Bailly v. Betti*, 241 N. Y. 22.

95. *Martin v. Smith*, 53 Super. Ct. (21 J. & S.) 277.

96. *Petrakion v. Arbeely*, 23 Civ. Proc. 183, 26 N. Y. Supp. 731.

97. *Dowd v. Hughes*, 173 App. Div. 118, 159 N. Y. Supp. 373; *Kuehnemundt v. Haar*, 46 Super. Ct. (14 J. & S.) 188; *Martin v. Smith*, 53 Super. Ct. (21 J. & S.) 277.

98. *Watts v. Adler*, 130 N. Y. 646.

partnership.⁹⁹ But an assignment made by one of several partners is void, and is no bar to action for an accounting.¹

A sub-partner with one engaged with others in a joint enterprise is entitled to an accounting in reference thereto, although the other partners had no knowledge of his sub-partnership.²

3. Effect of account stated.

As a general rule, the existence of an "account stated" between the partners precludes an action for an accounting.³ If the partners have voluntarily adjusted their accounts and acquiesced in the conclusion reached, in the absence of fraud, mistake or other similar circumstance, there is no necessity for action by a court of equity.⁴ The remedy of a partner having a balance due him is to bring an action at law on the account stated.⁵ If, however, the settlement was the result of fraud or other infirmative consideration, a partner injured thereby may have relief in equity.⁶ He may maintain an action to rescind the settlement and for an accounting, but he has the burden of impeaching the settlement.⁷ And, in some cases, he may be permitted to show an error in an item in the account and to have this item corrected.⁸ If a partner brings an action for a general accounting, and the defendant sets up an account stated as a defense, the plaintiff is not allowed to attack the account without amending his complaint so as to allege the error therein.⁹ Where a defendant proves an account stated as a defense, the court

99. *Kuehnemundt v. Haar*, 46 Super. Ct. (14 J. & S.) 188.

1. *Wetter v. Schlieper*, 4 E. D. Smith 707, 6 Abb. Pr. 123, 15 How. Pr. 268.

2. *Nirdlinger v. Bernheimer*, 133 N. Y. 45.

3. *Wahl v. Barnum*, 116 N. Y. 87; *Sherburne v. Taft*, 142 N. Y. 619; *Sherburne v. Taft*, 20 N. Y. Supp. 757, 49 St. Rep. 771, affirmed 142 N. Y. 619; *Greenslete v. Ferguson*, 191 App. Div. 745, 182 N. Y. Supp. 198; *Sprague v. Beekman*, 8 Weekly Dig. 362. And see, supra, I-G, Account stated as a defense.

4. *Wahl v. Barnum*, 116 N. Y. 87; *Morsch v. Schoenbaum*, 200 App. Div.

441, 193 N. Y. Supp. 266; *Ogden v. Astor*, 6 Super. Ct. (4 Sandf.) 311; *Sprague v. Beekman*, 8 Weekly Dig. 362.

5. *Morsch v. Schoenbaum*, 200 App. Div. 441, 193 N. Y. Supp. 266; *Weeks v. Hoyt*, 5 Hun 347; *Sherburne v. Taft*, 49 State Rep. 771, 20 N. Y. Supp. 757, affirmed 142 N. Y. 619.

6. *Morsch v. Schoenbaum*, 200 App. Div. 441, 193 N. Y. Supp. 266; *Weed v. Smull*, 7 Paige 573.

7. *Jagger v. Littlefield*, 10 Weekly Dig. 429.

8. *Bullock v. Boyd*, 2 Edw. Ch. 293.

9. *Weeks v. Hoyt*, 5 Hun 347; *Weed v. Smull*, 7 Paige 573.

is not bound to retain the action so as to permit the plaintiff to recover upon the account stated, but may dismiss the complaint.¹⁰

A statement of the partnership accounts rendered by one partner does not become an account stated merely because the other partner does not immediately make his protest.¹¹ But the retention of such a statement for a number of years without any objection, may amount to an acquiescence.¹²

4. When partnership exists.

In a case where the plaintiff's claim as to the relation of the parties is disputed, the plaintiff must, before the making of an interlocutory judgment directing an accounting, establish his right to an accounting.¹³ It is not always necessary that the plaintiff show a partnership relation, for an accounting may be had between joint adventurers,¹⁴ co-tenants,¹⁵ or other persons standing in a fiduciary relation.¹⁶ But, if the defendant claims that the plaintiff was merely an employee, though being paid for his services by a percentage of the profits, an issue is created which must be determined before the interlocutory judgment is rendered.¹⁷ An employee of this character is not entitled to maintain an equitable action of accounting, and an action by him will be dismissed.¹⁸ Or,

10. *Sherburne v. Taft*, 142 N. Y. 619.

11. *Hughes v. Smither*, 23 App. Div. 590, 49 N. Y. Supp. 115, affirmed on opinion below, 163 N. Y. 553.

12. *Atwater v. Fowler*, 1 Edw. 417; *Ogden v. Astor*, 6 Super. Ct. (4 Sandf.) 311.

13. *Armstrong v. Rickard*, 199 App. Div. 880, 192 N. Y. Supp. 502.

14. *Schantz v. Oakman*, 163 N. Y. 148. And see, *infra*, II-C, Joint adventurers.

15. See, *infra*, II-D, Joint tenants or tenants in common.

16. *Schantz v. Oakman*, 163 N. Y. 148; *Fairchild v. Valentine*, 30 Super Ct. (7 Rob.) 564. And see, *supra*, II-A, In general.

17. *Hutchinson v. Birdsong*, 211 App. Div. 316, 207 N. Y. Supp. 273.

Salary in addition to share of profits.—Where a written agreement

declares the existence of a copartnership, the fact that it also provides a salary to be paid to one of the partners for services as clerk, bookkeeper and manager in addition to his share of the net profits, does not prevent the relation of partners. *Salomon v. Skinner*, 5 Week. Dig. 491.

18. *Smith v. Bodine*, 74 N. Y. 30; *Hathaway v. Clendening Co.*, 135 App. Div. 407, 119 N. Y. Supp. 984; *Freeman v. Miller*, 157 App. Div. 715, 142 N. Y. Supp. 797; *Hutchinson v. Birdsong*, 211 App. Div. 316, 207 N. Y. Supp. 273; *Martin v. Riehl*, 27 Misc. 112, 58 N. Y. 141; *Heck v. Voelkle*, 95 Misc. 692, 160 N. Y. Supp. 903. See also, *Kent v. Universal Film Co.*, 200 App. Div. 539, 193 N. Y. Supp. 838. And see, *infra*, II-K, Master and servant.

if it develops that the relation between the parties was merely that of debtor and creditor, an action for an accounting cannot be sustained.¹⁹ In such cases, jurisdiction will not be retained to allow a recovery at law.²⁰

Whether two or more persons have formed a partnership is largely a matter of intention,²¹ to be determined from an examination of their dealings between themselves and with third persons.²² The existence of the alleged partnership may be a question of fact,²³ to be determined in the first instance by the judge before whom the case is tried, and subject to review on appeal if his decision is against the weight of evidence.²⁴ Section 11 of the Partnership Law, enumerates some of the criteria which aid in solving the problem. Ordinarily, it is required that the agreement of the parties contemplate the sharing of losses as well as profits. If the profits are to be divided, but the losses are not to be shared, the relation is not that of partners.²⁵ Although persons may be co-partners as to third persons, as between themselves they may have some other relation.²⁶

5. Illegal partnership.

A partnership may be created by oral agreement. The Statute of Frauds is no defense when one of the partners is seeking an accounting.²⁷ The capacity of one of the parties to enter into the partnership will not present a defense to the action. Thus, the fact that one of the parties is a corporation and the partnership is *ultra vires* as to it, does not preclude an action by it to compel a co-partner to account for profits retained by him.²⁸ But, if the co-partnership was formed for an illegal purpose, as for an illegal

19. *Salter v. Ham*, 31 N. Y. 321; *Low v. Swartwout*, 171 App. Div. 725. 157 N. Y. Supp. 1067. And see, *infra*, II-J, Debtor and creditor.

20. *Vincent v. Macbeth*, 211 App. Div. 110, 206 N. Y. Supp. 870.

21. *Salter v. Ham*, 31 N. Y. 321; *Solomons v. Ruppert*, 34 App. Div. 230, 54 N. Y. Supp. 729; *Vincent v. Macbeth*, 211 App. Div. 110, 206 N. Y. Supp. 870; *Hutchinson v. Birdsong*, 211 App. Div. 316, 207 N. Y. Supp. 273.

22. *Solomons v. Ruppert*, 34 App.

Div. 230, 54 N. Y. Supp. 729; *Salomon v. Skinner*, 5 Week. Dig. 491.

23. *Vincent v. Macbeth*, 211 App. Div. 110, 206 N. Y. Supp. 870.

24. *Summa v. Masterson*, 215 App. Div. 159, 213 N. Y. Supp. 177.

25. *Freeman v. Miller*, 157 App. Div. 715, 142 N. Y. Supp. 797; *Martin v. Riehl*, 27 Misc. 112, 58 N. Y. 141.

26. *Walker v. Spencer*, 86 N. Y. 162. And see, Partnership Law, § 27.

27. *Sanger v. French*, 157 N. Y. 213.

28. *Standard Oil Co. v. Scofield*, 16 Abb. N. C. 372.

combination in restraint of trade, equity will afford no relief.²⁹ Or, if the partnership arrangement was made for the purpose of defrauding the creditors of one of the parties, equity will not take an account between the parties and divide the fruits of the fraud.³⁰

6. Stockholders as partners.

While equity may disregard the form of a corporation in certain cases and treat the parties as co-partners, that is only done where the interests of justice require and the facts warrant such action, and one of the parties cannot at will turn the relation of stockholders in a corporation into members of a co-partnership. Accordingly, where the plaintiff and defendant after discussing the advisability of forming a co-partnership decided to and did organize a corporation and conducted the affairs of the concern in accordance with the law relating to corporations, the plaintiff cannot maintain a suit for dissolution and an accounting and the appointment of a receiver on the theory that the corporation was only a co-partnership, but the orderly procedure for the dissolution of a corporation must be pursued.³¹

7. Dissolution by act of partner.

The dissolution of a partnership is effected by the death or bankruptcy of a partner, or by the occurrence of various other events as outlined in section 62 of the Partnership Law. In such cases, no decree of the court is necessary for the dissolution, and a partner or his representative can require the winding up of the partnership affairs and an accounting. An assignee for the benefit of creditors of a bankrupt partner may require the other partners to account.³² If, after the dissolution, some of the partners continue the business and enter upon new enterprises with the firm property, they may be required to account to the outgoing partner or his representative for the resulting profits.³³

Before the enactment of the Partnership Law, a *bona fide*

29. Keene v. Rent, 25 Weekly Dig. 235.

30. Marsh v. Pierce, 21 Weekly Dig. 51.

31. Thomashefsky v. Edelstein, 192 App. Div. 368, 182 N. Y. Supp. 707.

See also, Berger v. Eichler, 211 App. Div. 479, 207 N. Y. Supp. 147.

32. King v. Leighton, 100 N. Y. 386.

33. Cahill v. Haff, 248 N. Y. 377; White v. Reed, 124 N. Y. 468.

assignment by a partner of his interest worked a dissolution of the firm and entitled such assignee to an accounting;³⁴ but, under the Partnership Law, a transfer of interest does not have this effect, unless the term of the partnership has expired or the partnership was without definite term.³⁵ A partnership for no definite term was always dissolvable by one of the partners by mere notice.³⁶ And, although the term was fixed, the partnership could be dissolved at any time at the will of any partner so far as to end the mutual relation and the authority of one partner to act for the others, but the partner so breaking the covenant was liable for damages.³⁷ Notwithstanding a provision in a partnership agreement for notice of intention to terminate the relation, either party may repudiate it at any time. No one can be forced to continue as partner against his will though he may be liable for breach of contract.³⁸

8. Dissolution by decree of court.

Upon the grounds stated in section 63 of the Partnership Law, the court may decree the dissolution of a partnership. An accounting may be directed without the dissolution of the partnership;³⁹ or, in an action for a dissolution, the court may, if such relief is demanded, direct an accounting of the partners.⁴⁰ The action lies to dissolve the partnership, and, if necessary, to dispose of the firm assets, pay the debts, state the account between the partners, and ascertain and divide the net surplus, and render judgment accordingly.⁴¹ The existence of unpaid firm obligations is no defense to the action.⁴² The court may direct the sale of real estate held by the partnership and the division of the proceeds. An action of partition for that purpose is not necessary.⁴³

34. *Marquand v. N. Y. Mfg. Co.*, 17 Johns, 525.

35. See Partnership Law, sections 53, 62.

36. *Pine v. Ormsbee*, 2 Abb. Pr. N. S. 375.

37. *Frear v. Lewis*, 166 App. Div. 210, 151 N. Y. Supp. 486.

38. *Cahill v. Haff*, 248 N. Y. 377.

39. *Sanger v. French*, 157 N. Y. 213;

Bailey v. Betti, 241 N. Y. 22; *Feinbloom v. Friedman*, 211 App. Div. 72, 206 N. Y. Supp. 617.

40. *Feinbloom v. Friedman*, 211 App. Div. 72, 206 N. Y. Supp. 617.

41. *Smith v. Fichette*, 56 Hun 473, 10 N. Y. Supp. 459, 31 St. Rep. 608.

42. *Smith v. Fichette*, 56 Hun 473, 10 N. Y. Supp. 459, 31 St. Rep. 608.

43. *Parker v. Parker*, 65 Barb. 205.

9. Establishment of partnership.

If the existence of the partnership is denied, an action in equity may be maintained to establish the partnership, and also for an accounting.⁴⁴ Such an action may be brought before the date on which the alleged partnership was to terminate.⁴⁵

10. Rescission of articles of partnership.

An action may be maintained by one partner to rescind the articles of partnership on the ground that he was induced by fraud or mistake to enter into the agreement. In such an action an accounting may be had.⁴⁶ The rights of one successfully maintaining such an action are outlined in section 70 of the Partnership Law.

11. Sale of partner's interest rescinded.

Where one member of a partnership sells his interest therein to the other members, who continue the business with the firm property, if the sale is subsequently set aside for fraud, the outgoing partner may require his co-partners to account to him as trustees for the profits resulting from the business after his retirement. Where, however, the retiring partner received on the sale more than the amount of his interest in the firm, he is not entitled to share in the subsequent profits. Nor can the continuing partners recover from him the excess which he has received over his actual interest in the firm.⁴⁷

12. Fraudulent transfer of partnership property.

A transfer of the partnership assets made by some of the partners without the knowledge or consent of other partners, operates as an immediate dissolution of the firm; and, if such transfer was fraudulent, the innocent partners can follow the assets into the hands of the transferee, or bring an action in equity against the guilty partners.⁴⁸ They may have an allowance of damages under section 69 of the Part-

44. *Bailey v. Betti*, 241 N. Y. 22; 31 N. Y. Supp. 487, 64 St. Rep. 72, affirmed 151 N. Y. 273.
Germann v. Jones, 220 App. Div. 5, 221 N. Y. Supp. 32.

45. *Bailly v. Betti*, 241 N. Y. 22. 47. *White v. Reed*, 124 N. Y. 468.

46. *Harlow v. LaBrum*, 82 Hun 292. 48. *Parry v. Parry*, 92 Misc. 490,

155 N. Y. Supp. 1072.

nership Law, or they may compel the other partners to surrender their shares of the proceeds.⁴⁹

13. Distribution of partnership property.

Section 71 of the Partnership Law enunciates the rules for the distribution of partnership property. In general, the partnership creditors are first to be paid; then the sums due to the partners other than for capital; then the amounts due to the partners for capital contributions are to be repaid; the balance is to be distributed as profits according to the shares of the partners therein.⁵⁰

14. Debts due to partner from partnership.

In the distribution of the assets of a partnership, after the payment of sums due to third persons, there should be deducted and paid to each of the partners any sums which are due from the firm to him.⁵¹ The expenses and disbursements of a partner while engaged in the business of the firm, should be allowed to him.⁵² Such matters, however, must be proved with reasonable certainty or the claim will be rejected.⁵³ It is desirable, but not necessary, that receipts or cancelled checks or some corroborative evidence of such payments be presented.⁵⁴ A partner may be credited with

49. *Tannenbaum v. Armeny*, 81 Hun 581.

50. *McCall v. Moschowitz*, 10 Civ. Proc. R. 107, 14 Daly 16, 1 State Rep. 99; *Williams v. Lindblom*, 68 Hun 173, 52 State Rep. 78, 22 N. Y. Supp. 678, affirmed on opinion below, 142 N. Y. 682.

51. Partnership Law, § 71.

Property furnished by partner.—A partner may be allowed a credit for the use of his individual property occupied by the firm. *Kraus v. Kraus*, 250 N. Y. 63.

52. Income tax disbursements.—A partnership having been established between a father and his two sons, where, upon an accounting by the father at the suit of plaintiff, one of the sons, it appears that the business was in the father's name and in making his return for income taxes he,

with the knowledge and approval of his sons, included the whole income of the business and paid the tax accordingly, thereby paying a large sum in excess of the tax due if computed on his share alone, a charge against each of the two sons of one-half of the excess paid was proper. The fact is not material that the effect of this allowance may be to deprive the plaintiff of the benefit of exemptions and deductions that might conceivably have been his if the excess had been included in his own reports of income, since his acquiescence bars him from limiting so narrowly the measure of the charge against him. *Kraus v. Kraus*, 250 N. Y. 63.

53. *Chandler v. Allen*, 20 Hun 424.

54. *Morsch v. Schoenbaum*, 200 App. Div. 441, 193 N. Y. Supp. 266.

sums paid to a creditor of the firm, but the payment of a claim barred by the Statute of Limitations is voluntary and cannot be considered.⁵⁵ A disbursement made for an illegal or criminal purpose cannot be allowed. Even though the other partners have sanctioned the unlawful payments, they cannot be considered in a court of equity.⁵⁶

15. Partner wrongfully appropriating assets of firm.

If one partner wrongfully appropriates the partnership assets, his conduct may constitute a breach of the partnership agreement so as to allow his co-partner an award of damages on the accounting.⁵⁷ A surviving partner may be required to account for the firm transactions and for transactions requisite to wind up the firm business, and if he continues the partnership business, with no accounting, retaining and using therein capital belonging to the estate of the deceased partner with the consent, express or implied, of his representatives, the latter are entitled at their option to receive the profits attributable to the use of his rights in the property of the dissolved partnership.⁵⁸ If one member of the firm forces a dissolution and seizes its property and continues the business with new partners, he may be held to have unlawfully appropriated the good will of the firm and may be required to account therefor, its value to be

55. *Grimes v. Osterhoudt*, 18 State Rep. 422, 2 N. Y. Supp. 436.

56. *Rodgers v. Clement*, 15 App. Div. 561, 78 State Rep. 516, 44 N. Y. Supp. 516, reversed on other grounds, 162 N. Y. 422.

57. Partnership Law, § 69.

Profits may be allowed in cases of the wrongful use in new enterprises by surviving or continuing partners, of the capital of the deceased, or retired partner, whenever it is made to appear that the use of such capital was a breach of trust or a gross fraud upon the deceased, or retired partner, and that the allowance of such profits is, under all the circumstances, equitable. But whenever, upon the special facts of a case, such allowance, is not equitable, the account must be confined to the completed business of the

firm at the time of the dissolution, and to such profits as were made after the dissolution upon the unfinished contracts or enterprises of the firm, and, in addition, the surviving or continuing partners are to be charged with interest upon the deceased or retired partner's share of the surplus existing after the discharge of the partner's liabilities. Moreover, they must bear all the losses sustained by or on account of new enterprises. *White v. White*, 23 Jones & S. (55 Super. Ct.) 417, 14 St. Rep. 738.

Use of land.—A partner may be charged with the individual use of partnership realty, as he is not a tenant in common, but a "tenant in partnership." *Kraus v. Kraus*, 250 N. Y. 53.

58. *Cahill v. Haff*, 248 N. Y. 377.

determined in view of all of the circumstances.⁵⁹ But, if the partnership is dissolved through time limitation, a partner has the right to solicit business from the former customers of the firm without being chargeable with the appropriation of its good will.⁶⁰

16. Secret profits.

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.⁶¹ That is to say, a partner is bound to the exercise of good faith to his co-partners, and is accountable for any secret profits received by him.⁶² To illustrate, a partner who obtains a renewal or extension of a partnership lease, secretly in his own name or interest, will be held as a trustee for the firm in respect of the renewal or extension.⁶³

Where some of the members of a firm, without the knowledge of the others, and contrary to covenants in the articles of co-partnership, engage in other business and use the firm's credit and means therein and appropriate the profits to their own use, they thereby commit a fraud upon the firm. The other members of the firm, on discovering the facts, may elect to have such business and its profits treated as the business and the profits of the firm. If claimed and adjudged to be treated as the business of the firm, in stating an account, in respect thereto, those who prosecuted it, must be credited with moneys paid for the property used in it. The practice and concealment of such a fraud, and a discovery of it subsequent to a settlement of accounts between the partners, give a right to the defrauded partners to have the account opened, and an accounting in respect to such business.⁶⁴

59. *Frear v. Lewis*, 166 App. Div. 210, 151 N. Y. Supp. 486.

60. *Janes v. Cadenas*, 200 App. Div. 635, 193 N. Y. Supp. 513.

61. Partnership Law, § 43.

62. *May v. Hettrick Bros. Co.*, 181 App. Div. 3, 167 N. Y. Supp. 966, affirmed without opinion, 226 N. Y. 580; *China & J. Trading Co. v.*

Provand, 155 App. Div. 171, 140 N. Y. Supp. 79.

63. *Mitchell v. Reed*, 61 N. Y. 123; *Maas v. Goldman*, 122 Misc. 221, 203 N. Y. Supp. 524, affirmed 210 App. Div. 845, 206 N. Y. Supp. 930.

64. *Herrick v. Ames*, 21 Super. Ct. (8 Bosw.) 115.

17. Allowance of damages for breach of agreement.

Where dissolution of a partnership is caused in contravention of the partnership agreement, a partner not so causing the dissolution has the right, as against a partner who has acted wrongfully, to recover damages for breach of the agreement.⁶⁵ One wrongfully expelled from the partnership may, upon an accounting, recover not only his share of the profits up to the time of the expulsion, but also his share of the profits realized from the appropriation by the other partners of the partnership assets and good will.⁶⁶ In order to have such damages considered on the accounting, it is necessary that the claimant thereof should himself have performed the partnership agreement.⁶⁷ A partner who has not fully and fairly performed the partnership agreement on his part has no standing in a court of equity to enforce any rights under the agreement. He may have what is his, but not what would have become his had he performed the contract.⁶⁸ Hence, the question of his performance should be determined by the interlocutory judgment so that, if necessary, the scope of the accounting may include a claim for damages.⁶⁹

The damages allowable in such cases will frequently be so difficult of appraisal that the court may be influenced to permit but nominal damages; yet substantial damages will be willingly granted if they are established with reasonable certainty.⁷⁰ Where the fact of loss is clear, the wrongdoer will not be permitted to say that the innocent party shall

65. Partnership Law, § 69. *Reeves v. Bushby*, 25 Misc. 226, 55 N. Y. Supp. 70; *Hagenaers v. Herbst*, 30 App. Div. 546, 52 N. Y. Supp. 360, affirmed on opinion below, 164 N. Y. 603.

66. *Schnitzer v. Josephthal*, 122 Misc. 15, 202 N. Y. Supp. 77, affirmed without opinion, 208 App. Div. 769, 202 N. Y. Supp. 952.

67. *Schnitzer v. Josephthal*, 122 Misc. 15, 202 N. Y. Supp. 77, affirmed without opinion, 208 App. Div. 769, 202 N. Y. Supp. 952.

68. *Schnitzer v. Josephthal*, 122 Misc. 15, 202 N. Y. Supp. 77, affirmed without opinion, 208 App. Div. 769, 202 N. Y. Supp. 952.

69. *Schnitzer v. Josephthal*, 122 Misc. 15, 202 N. Y. Supp. 77, affirmed 208 App. Div. 769, 202 N. Y. Supp. 952.

70. Where the agreement was to establish the plaintiff on the termination of the partnership in a business as good as that which he gave up on entering the firm, it was held that the allowance of his former profits for one year was liberal, and that he was not entitled to a gross sum which would produce an income equal to his former profits during the probable term of his life. *Smith v. Smith*, 116 App. Div. 165, 101 N. Y. Supp. 521.

be deprived of all recovery merely because the exact amount of damage cannot be fixed with precision.⁷¹ Prospective profits for the period during which the partnership should have been continued may be recovered on the basis of past profits, taking average, not exceptional, years as a criterion.⁷² Loss of profits in theatrical enterprises are to be allowed when they are satisfactorily shown.⁷³

18. Services and expenses winding up partnership.

Under the Partnership Law, a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.⁷⁴

19. Capital returned to partners.

After the dissolution of the partnership, the payment of creditors of the firm, the allowance to the partners for moneys due to them by reason of partnership transactions, there is paid out of the partnership assets the liabilities to the several partners arising in respect to the capital of the firm.⁷⁵ The capital is ordinarily distributed among the partners in the proportion in which they contributed to it.⁷⁶ A partnership agreement which contemplates any other distribution of capital should so state in language so clear as to leave no reasonable doubt.⁷⁷ Where one partner's contribution toward the capital consists of tangible property, the valuation of this property as contained in the partnership agreement may be binding in determining the amount of his capital contribution, but it is not binding as the value of the property when it is sought to charge a partner taking possession of it. Its actual value should then be ascertained.⁷⁸

71. *Brady v. Erlanger*, 188 App. Div. 728, 177 N. Y. Supp. 301, affirmed 231 N. Y. 563.

72. *Smith v. Smith*, 116 App. Div. 165, 101 N. Y. Supp. 521.

73. *Brady v. Erlanger*, 188 App. Div. 728, 177 N. Y. Supp. 301, affirmed 231 N. Y. 563.

74. Partnership Law, § 71, subd. 6. See *Cahill v. Haff*, 248 N. Y. 377; *Greenslete v. Ferguson*, 191 App. Div.

745, 182 N. Y. Supp. 198; *Phein v. Peeso*, 194 App. Div. 274, 185 N. Y. Supp. 150.

75. Partnership Law, § 71.

76. *Neudecker v. Kohlberg*, 3 Daly 407.

77. *Gillespie v. Gillespie*, 124 Misc. 881, 210 N. Y. Supp. 303; *Neudecker v. Kohlberg*, 3 Daly 407.

78. *Weldon v. Beckel*, 10 Daly 472.

20. Allowance of interest to partner.

Under the Partnership Law a partner, who in aid of the partnership makes any payment or advance beyond the amount of capital he agreed to contribute, shall be paid interest from the date of the payment or advance.⁷⁹ It restricts the allowance of interest on capital contributed by a partner by providing he shall receive it only from the date when repayment should have been made.⁸⁰ The statute, however, applies only when no other agreement has been made by the partners in reference to interest. The partners may make an oral agreement that interest shall accrue on balances not withdrawn by a partner.⁸¹ An oral agreement may be made for the allowance of interest to one partner on that part of the capital contributed by him which is in excess of the part contributed by other partners.⁸²

A partner is entitled to interest upon advances of money made to the firm without any express agreement respecting interest, when those advances are in fact loans, with respect to which he is a creditor of the firm; but he is not entitled to interest on his contributions to the capital of the firm or additions thereto, unless there is a special agreement that he shall have interest thereon.⁸³

A partner who draws out money from co-partnership funds is not chargeable with compound interest, but with simple interest only, on the sums drawn out; unless it appears that he has traded or speculated with the money, and made a profit on it, and refused, on being called on to disclose the profits.⁸⁴

21. Division of profits or losses.

After the satisfaction of debts due to third persons, the payment to the partners of sums due to them other than for capital and profits, and the repayment to each of the mem-

^{79.} Partnership Law, § 40, subd. 3. And see *Kraus v. Kraus*, 250 N. Y. 63.

^{80.} Partnership Law, § 40, subd. 4.

^{81.} *Kirkwood v. Smith*, 132 App. Div. 758, 117 N. Y. Supp. 686; *Brady v. Erlanger*, 188 App. Div. 728, 177 N. Y. Supp. 301, affirmed 231 N. Y. 563.

^{82.} *Erlanger v. Klaw*, 209 App. Div. 103, 204 N. Y. Supp. 344, holding that

the charging of such interest in the accounts of the partners without protest by other partners is corroborative of the making of such an oral agreement.

^{83.} *Rodgers v. Clement*, 162 N. Y. 422.

^{84.} *Stoughton v. Lynch*, 2 Johns. Ch. 209.

bers of such sums as he has contributed as capital, the balance of the assets of the partnership are distributed among the partners in the proportions to which they are entitled under the articles of partnership.⁸⁵ If the venture has resulted in loss, such loss will be apportioned according to the agreement, although the capital so lost may have been contributed in other proportions.⁸⁶ In determining the amount of the profit or loss, the valuation of property contributed as capital is not necessarily to be taken according to the valuation thereof as stated in the articles of partnership.⁸⁷ In an accounting to determine the amount of the profits of a business conducted by two persons after its termination, where one person had title to all of the property and the other was to have one-half of the net profits, a reasonable valuation of the goods of the concern still on hand is proper to be included as part of the profits.⁸⁸

As to each partner who has underdrawn, all of the others are liable to him for their respective portions of the amount of the underdraft; and as to each partner who has overdrawn, he is liable to all of the others for their respective portions of such overdraft.⁸⁹

22. Partnership books.

The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.⁹⁰ As a general rule, entries made in the books of a partnership, during the continuance of the firm, are, in a subsequent adjustment of their accounts, evidence for and against the members of the firm.⁹¹ Annual adjustments of the accounts upon the books, in the absence of proof of fraud or mistake, are binding upon them.⁹² The books are *prima facie* evi-

85. Partnership Law, § 71.

86. Jones v. Butler, 87 N. Y. 613.

87. Jones v. Butler, 87 N. Y. 613.

88. Ranney v. Felton, 14 Week. Dig. 370.

89. Spier v. Hyde, 47 Misc. 443, 95 N. Y. Supp. 952; Butler v. Ballard, 43 Super. Ct. (11 J. & S.) 191; Salomon v. Skinner, 5 Week. Dig. 491.

90. Partnership Law, § 41.

91. Caldwell v. Leiber, 7 Paige 483.

Statement from books.—A statement from the books prepared by the bookkeeper of one of the partners at the request of such partner, is admissible as against him. Donovan v. Clark, 138 N. Y. 631.

92. DeMott v. Kendrick, 47 State Rep. 731, 20 N. Y. Supp. 195.

dence in any controversy arising between the partners, or between their personal representatives, concerning the state of the partnership transactions.⁹³ The fact that one of the partners has not exercised his right of examining the books, does not affect their admissibility as evidence.⁹⁴ But, though *prima facie* evidence, they are by no means conclusive.⁹⁵ Even the partner introducing them in evidence, may subsequently impeach an item.⁹⁶ Fraud or mistake is a proper ground on which to challenge an entry in the books.⁹⁷ A party claiming fraud or mistake in the books has the burden of establishing his claim.⁹⁸ But entries made on the books after the dissolution of the firm, by one partner are not even *prima facie* evidence as against the other partners.⁹⁹

In the absence of the books, a statement of the account made, or acquiesced in, by the partners, may form the basis for the adjustment of their accounts. And, if such statement has been lost, secondary evidence of its contents may be given.¹

23. By whom action maintained.

The action may be maintained by one of the partners during the life of the partnership; or after his death by his personal representative.² An assignee of the interest of a partner is entitled to an account of the dealings of the firm from its other members, and to share, to the extent of his rights, in the surplus of the property of the firm.³ In case of the bankruptcy of a member, his trustee is entitled to an accounting and to receive the bankrupt's share in the firm assets.⁴

93. Cheever v. Lamar, 19 Hun 130.

94. Cheever v. Lamar, 19 Hun 130.

95. Donovan v. Clark, 138 N. Y. 631.

96. Donovan v. Clark, 138 N. Y. 631.

97. Dwyer v. Rorke, 10 App. Div. 236, 75 State Rep. 1112, 41 N. Y. Supp. 721.

98. Cheever v. Lamar, 19 Hun 130; Stoughton v. Lynch, 2 Johns. Ch. 209; Caldwell v. Leiber, 7 Paige 483.

99. Boyd v. Foot, 18 Super. Ct. (5 Bosw.) 110.

1. Hall v. Sherman, 11 Weekly Dig. 534.

2. Goldsticker v. Goldsticker, 106 Misc. 182, 174 N. Y. Supp. 257.

3. Menagh v. Whitwell, 52 N. Y. 146; Aroma Holding Corp. v. Fraser, 125 Misc. 333, 209 N. Y. Supp. 756; Stokes v. Stokes, 59 Hun 431, 36 St. Rep. 620, 13 N. Y. Supp. 407, affirmed without opinion 128 N. Y. 615.

4. King v. Leighton, 100 N. Y. 386.

24. Parties defendant.

All of the surviving members of the firm are usually necessary parties to the action, in order that there may be a complete settlement of its affairs.⁵ This is true although a partner may have assigned his interest to a third person and the latter is a party.⁶ The personal representative of a deceased member should also be made a party.⁷ A person not a member of the firm is not a necessary party, although, as an employee, he may be entitled to a percentage of its profits.⁸ Ordinarily third persons who have had dealings with a member of the firm are not necessary parties.⁹ But one to whom a partner has wrongfully transferred substantial assets of the firm, may, in some cases, be brought in as a party and be required to account therefor.¹⁰

C. Joint adventurers.

1. In general.

The rights and remedies of joint adventurers, *inter se*, are similar to those of partners.¹¹ A joint adventure is a limited partnership, not limited in a statutory sense as to liability, but as to its scope and duration.¹² It is sometimes

5. *Brady v. Erlanger*, 165 App. Div. 29, 149 N. Y. Supp. 929.

6. *Pine Cliffs Farms v. Collier*, 92 Misc. 269, 156 N. Y. Supp. 293.

7. *Hausling v. Rheinfrank*, 103 App. Div. 517, 93 N. Y. Supp. 121; *Stokes v. Stokes*, 59 Hun 431, 36 St. Rep. 620, 13 N. Y. Supp. 407, affirmed without opinion 128 N. Y. 615. Compare *Parry v. Parry*, 92 Misc. 490, 155 N. Y. Supp. 1072.

8. *Kent v. Universal Film Co.*, 200 App. Div. 539, 193 N. Y. Supp. 838.

9. *Sanger v. French*, 157 N. Y. 213.

10. *Beugger v. Ashley*, 161 App. Div. 576, 146 N. Y. Supp. 910; *Parry v. Parry*, 92 Misc. 490, 155 N. Y. Supp. 1072.

11. *Wilcox v. Pratt*, 125 N. Y. 688; *O'Hara v. Harman*, 14 App. Div. 167, 43 N. Y. Supp. 556; *Stem v. Warren*, 185 App. Div. 823, 174 N. Y. Supp. 30, modified 227 N. Y. 538; *Brown v. Leach*, 189 App. Div. 158, 178 N. Y.

Supp. 319, appeal dismissed, 228 N. Y. 612; *Worms v. Lake*, 198 App. Div. 776, 191 N. Y. Supp. 113; *Hutchinson v. Birdsong*, 211 App. Div. 316, 207 N. Y. Supp. 273; *McDermott v. Rossney Contracting Corp.*, 131 Misc. 759, 228 N. Y. Supp. 1; *Josias v. Sugar Products Co.*, 169 N. Y. Supp. 887, affirmed without opinion, 187 App. Div. 905, 174 N. Y. Supp. 908.

"Whether it was a partnership or a joint enterprise, the contract is to be enforced and the rights and liabilities of the parties determined upon the same principles as are applied by courts of equity to partnership transactions." *Wilcox v. Pratt*, 125 N. Y. 688.

As to third parties, one of the adventurers may not be a general agent for the joint enterprise. *Graham Bros. v. St. Paul, etc., Ins. Co.*, 127 Misc. 403, 216 N. Y. Supp. 346.

12. *Hutchinson v. Birdsong*, 211 App.

referred to as a quasi-partnership.¹³ In order to constitute a joint adventure, it is not sufficient that the parties share in the profits and losses, but in addition there must be an intention of the parties to be associated as joint adventurers. A mere employee may be entitled to share in the profits.¹⁴ The distinction between the relation of joint adventurers and that of master and servant is to be maintained,¹⁵ for one, who, as a mere servant, is entitled to participation in the profits of an enterprise, is not entitled to maintain an equitable action for an accounting.¹⁶ A mere agency cannot be construed as a joint enterprise for the purpose of an equitable accounting.¹⁷

An action at law cannot be maintained by one of the adventurers to recover his share of the investment or profits unless there has been an accounting, a balance struck, and an express promise to pay.¹⁸ When the parties have voluntarily accounted, the remedy is at law to recover the amount computed to be due.¹⁹ But, in the absence of a voluntary settlement of the accounts, the sole remedy of one of the adventurers is an action in equity for an accounting.²⁰ The

Div. 316, 207 N. Y. Supp. 273; *Ross v. Willett*, 76 Hun 211, 27 N. Y. Supp. 785, 58 St. Rep. 694.

13. *Worms v. Lake*, 198 App. Div. 776, 191 N. Y. Supp. 113.

14. *Hutchinson v. Birdsong*, 211 App. Div. 316, 207 N. Y. Supp. 273.

15. *Everett v. DeFontaine*, 78 App. Div. 219, 79 N. Y. Supp. 692; *Lardizabal v. Valentine*, 185 App. Div. 124, 172 N. Y. Supp. 863; *Franken-Karch Corp. v. Castriotis*, 195 App. Div. 529, 186 N. Y. Supp. 344.

16. See, *infra*, II-K, Master and servant.

17. *Schantz v. Oakman*, 163 N. Y. 148; *Conger v. Judson*, 69 App. Div. 121, 74 N. Y. Supp. 504.

18. *Consolidated Machinery & W. Co. v. Harper Machinery Co.*, 190 App. Div. 283, 180 N. Y. Supp. 135; *Murphy v. Community Motion Picture Bureau*, 190 N. Y. Supp. 849.

19. *Spier v. Hyde*, 32 Misc. 26, 66 N. Y. Supp. 120.

20. *Marston v. Gould*, 69 N. Y. 220;

King v. Barnes, 109 N. Y. 267; *Boice v. Jones*, 106 App. Div. 547, 94 N. Y. Supp. 896; *Rice v. Peters*, 128 App. Div. 776, 113 N. Y. Supp. 40; *China & J. Trading Co. v. Provand*, 155 App. Div. 171, 140 N. Y. Supp. 79; *May v. Hettrick Bros. Co.*, 181 App. Div. 3, 167 N. Y. Supp. 966, affirmed without opinion, 226 N. Y. 580; *Lardizabal v. Valentine*, 185 App. Div. 124, 172 N. Y. Supp. 863; *Brown v. Leach*, 189 App. Div. 158, 178 N. Y. Supp. 319 appeal dismissed 228 N. Y. 612; *Consolidated Machinery & W. Co. v. Harper Machinery Co.*, 190 App. Div. 283, 180 N. Y. Supp. 135; *Kreamer v. World Wide Trading Co.*, 195 App. Div. 305, 187 N. Y. Supp. 16; *Franken-Karch Corp. v. Castriotis*, 195 App. Div. 529, 186 N. Y. Supp. 344; *Worms v. Lake*, 198 App. Div. 776, 191 N. Y. Supp. 113; *Peralta v. Escobar*, 207 App. Div. 611, 202 N. Y. Supp. 714; *Ongley v. Marcin*, 214 App. Div. 455, 212 N. Y. Supp. 690; *Botway v. Schnitzer*, 217 App. Div. 468, 216 N. Y. Supp.

remedy is available although it may be that the accounting will show that the plaintiff is indebted to the defendant.²¹ But it is said that the existence of profits is necessary for such an action of accounting.²²

On the other hand there may be a remedy at law for damages for breach of a contract to enter into or carry out a joint adventure.²³ So, too, if the enterprise has resulted in a loss, the person who has borne the entire loss may maintain an action against the other adventurers to recover their shares of the loss.²⁴ Or, if there is but a single transaction involved, such as the commission due for effecting the sale of a parcel of real estate, the matter can be determined in an action at law.²⁵

2. Action for dissolution and accounting.

In a proper case, an action may be maintained for the dissolution of a joint adventure together with further relief by way of accounting.²⁶ On the refusal of one party to carry out his part of the enterprise, or to account for property or proceeds in his hands, the court may direct a dissolution and an accounting.²⁷

3. Good faith between parties.

Joint adventurers owe the duty of the utmost good faith to their co-adventurers, and upon the completion or abandonment of the enterprise, one of the parties cannot act for

755; *Grace v. Oliver*, 218 App. Div. 335, 218 N. Y. Supp. 263; *Bradley v. Wolff*, 40 Misc. 592, 83 N. Y. Supp. 13; *Pine Cliffs Farms v. Collier*, 92 Misc. 269, 156 N. Y. Supp. 293; *Worms v. Lake*, 120 Misc. 210, 198 N. Y. Supp. 861, reversed on other grounds, 208 App. Div. 606, 203 N. Y. Supp. 659; *Albrecht v. Robert Dollar Co.*, 123 Misc. 640, 205 N. Y. Supp. 721; *Josias v. Sugar Products Co.*, 169 N. Y. Supp. 887, affirmed without opinion, 187 App. Div. 905, 174 N. Y. Supp. 908; *Murphy v. Community Motion Picture Bureau*, 190 N. Y. Supp. 849; *Turner v. Weston*, 40 State Rep. 962, 16 N. Y. Supp. 772, affirmed 133 N. Y. 650.

21. *Crosby v. Watts*, 41 Super. Ct.,

(9 J. & S.) 208, affirming 49 How. Pr. 364.

22. *Parks v. Gates*, 84 App. Div. 534, 82 N. Y. Supp. 1070.

23. *Parks v. Gates*, 84 App. Div. 534, 82 N. Y. Supp. 1070; *Crownshield Trading Corp. v. Earle*, 200 App. Div. 10, 192 N. Y. Supp. 304.

24. *Burleigh v. Bevin*, 22 Misc. 38, 48 N. Y. Supp. 120.

25. *Kugler v. Sheerman*, 194 N. Y. Supp. 852.

26. *Hoisting Machinery Co. v. Scofield Engineering Co.*, 163 App. Div. 883, 147 N. Y. Supp. 564; *Grace v. Oliver*, 218 App. Div. 335, 218 N. Y. Supp. 263.

27. *Bradley v. Wolff*, 40 Misc. 592, 83 N. Y. Supp. 13.

himself to the prejudice of the interests of the adventure.²⁸ If he does and thereby obtains for himself benefits that would otherwise accrue to the joint adventurers, he will be required to account therefor in equity.²⁹ Secret profits are abhorred by a court of equity, and must be accounted for.³⁰ Where the enterprise has for its object the completion of a certain piece of work or the accomplishment of a certain result, it is presumed that the parties intended the relation to continued until its object has been accomplished. Until that time arrives one party cannot terminate the joint adventure and continue the enterprise for his own benefit. Nor can one party exclude another without his consent. The enterprise may be terminated at any time by consent, but the consent must be mutual.³¹ Upon the death of one, the surviving parties cannot assume the joint property and its proceeds, without accounting to the representative of his estate.³²

If one is induced by fraudulent representations to become a member of a joint adventure, he may upon the discovery of the fraud rescind the transaction and recover the capital contributed by him; but his remedy for misconduct in the affairs of the joint enterprise is an accounting in equity, in which suit he will be allowed to recover his damages.³³

4. Parties.

The action for an accounting between joint adventurers may be brought by one of the parties; or, upon his death,

28. *King v. Barnes*, 109 N. Y. 267; *Stem v. Warren*, 185 App. Div. 823, 174 N. Y. Supp. 30, modified 227 N. Y. 528; *Brown v. Leach*, 189 App. Div. 158, 178 N. Y. Supp. 319, appeal dismissed, 228 N. Y. 612; *Meinhard v. Salmon*, 223 App. Div. 663, 229 N. Y. Supp. 345.

29. *China & J. Trading Co. v. Provand*, 155 App. Div. 171, 140 N. Y. Supp. 79; *Stem v. Warren*, 185 App. Div. 823, 174 N. Y. Supp. 30, modified 227 N. Y. 528; *Brown v. Leach*, 189 App. Div. 158, 178 N. Y. Supp. 319, appeal dismissed, 228 N. Y. 612; *Botway v. Schnitzer*, 217 App. Div. 468, 216 N. Y. Supp. 755.

30. *May v. Hettrick Bros. Co.*, 181

App. Div. 3, 167 N. Y. Supp. 966, affirmed without opinion, 226 N. Y. 580; *May v. Hettrick Bros. Co.*, 200 App. Div. 754, 193 N. Y. Supp. 678, affirmed without opinion, 235 N. Y. 601; *Seligson v. Weiss*, 222 App. Div. 634, 227 N. Y. Supp. 338.

31. *Brown v. Leach*, 189 App. Div. 158, 178 N. Y. Supp. 319, appeal dismissed, 228 N. Y. 612; *Hawley v. Cramer*, 4 Cow. 717.

32. *Ongley v. Marcin*, 180 App. Div. 685, 168 N. Y. Supp. 30.

33. *Worms v. Lake*, 198 App. Div. 776, 191 N. Y. Supp. 113. Compare, *Worms v. Lake*, 208 App. Div. 606, 203 N. Y. Supp. 659.

by his personal representative. All of the joint adventurers should be parties, in order that a complete accounting may be had. This is true as to one who has assigned his interest in the venture to a third person.³⁴ But one who is a non-resident is not a necessary party.³⁵ Nor is an agent of one of the members a necessary party, although he may have unlawfully received some of the property of the adventurers.³⁶ Likewise, an employee of the enterprise, though his compensation is measured by a percentage of the profits, is not a necessary party.³⁷

D. Joint tenants or tenants in common.

1. In general.

Section 532 of the Real Property Law (formerly section 1666 of the Civil Practice Act) authorizes a joint tenant or tenant in common of real property to maintain an action at law against his co-tenant to recover his just proportion of the rent.³⁸ Section 1075 of the Civil Practice Act continues in force the rule that, in an action for the partition of real estate, the court can adjust the rights of the parties by reason of the receipt by one of more than his just proportion of the rents and profits of the premises.³⁹ But the jurisdiction of equity over the accounts of the co-tenants is older than the statutes. Originally, a court of equity was the only forum which had jurisdiction of such a controversy.⁴⁰ The enactment of the statute authorizing an action at law did not deprive the court of its equitable jurisdiction.⁴¹ This is clearly so as to co-tenants who hold their estate through descent, as between such persons there is a

34. *Pine Cliffs Farms v. Collier*, 92 Misc. 269, 156 N. Y. Supp. 293.

35. *Angell v. Lawton*, 76 N. Y. 540.

36. *Lardizabal v. Valentine*, 185 App. Div. 124, 172 N. Y. Supp. 863.

37. *Kent v. Universal Film Co.*, 200 App. Div. 539, 193 N. Y. Supp. 838.

38. *Dolan v. Dolan*, 125 Misc. 849, 211 N. Y. Supp. 507; *Cochran v. Carington*, 25 Wend. 409.

39. See, *Fiero on Particular Actions and Proceedings*, Vol. 3, page 2633.

40. *Minion v. Warner*, 238 N. Y. 413; *Minion v. Warner*, 185 App. Div. 246, 173 N. Y. Supp. 69; *Sherman v. Ballou*,

8 Cow. 304. "Before the first Constitution of this State, adopted April 20, 1777, equity had concurrent jurisdiction of such suits for accounting. Baron Comyn's Digest, published in 1762, declared as settled in chancery that 'A joint-tenant or tenant in common, &c. shall have an account in equity, against his companion, for his share of the profits of an estate.'" *Minion v. Warner*, 185 App. Div. 246, 173 N. Y. Supp. 69.

41. *Minion v. Warner*, 238 N. Y. 413.

quasi trust relationship.⁴² The remedy by way of partition cannot be had where the parties have voluntarily disposed of the real estate. The remedy at law is not available where there is more than one party plaintiff desiring to maintain the action, or where the plaintiff is ignorant of what rents have been received.⁴³

2. Scope of accounting.

If one of the owners actually receives money or property from the premises, there exists a liability on his part to pay the other owners their shares of the receipts.⁴⁴ Or, if one of the owners has ousted his co-tenants from possession of the premises, or has totally denied their rights, he may be compelled to account for the reasonable value of his exclusive use.⁴⁵ Likewise, if a tenant in possession has removed for his own benefit a part of the freehold, such as rock from a quarry, minerals from a mine, or sand from a sand bank, there exists a liability to account.⁴⁶ So, too, if the premises are sold and one of the tenants has received more than his just proportion of the selling price, an accounting is justified.⁴⁷ Or, if an agreement has been made whereby the tenant in possession is to pay for the use of the premises, he may be required to account. But, when one of the owners has merely occupied the premises without any agreement as to payment for its use, and has not ousted his co-tenants or received actual money, rents or profits, there is no liability to account to the co-owners for the value of the use of the

42. *Minion v. Warner*, 238 N. Y. 413.

43. *Minion v. Warner*, 185 App. Div. 246, 173 N. Y. Supp. 69.

44. *Aroma Holding Co. v. Fraser*, 125 Misc. 333, 209 N. Y. Supp. 756.

Co-tenant acting as agent.—Where one of several tenants in common of real property acts as agent for all, upon a contract, express or implied, that he will collect the rents, pay taxes, etc., and pay over to his co-tenants their shares of the net income, an action may be maintained by them jointly as upon a money demand arising on contract. Such an arrangement supersedes the ordinary rights of a tenant in common, so far as incon-

sistent with the obligations of the agency. It is not necessary to bring an action of an equitable nature, for an accounting, nor an action upon the statute relating to tenants in common. *Tuers v. Tuers*, 16 Abb. N. C. 464.

45. *Salisbury v. Slade*, 22 App. Div. 346, 48 N. Y. Supp. 55, reversed on other grounds, 160 N. Y. 278; *Willes v. Loomis*, 94 App. Div. 67, 87 N. Y. Supp. 1086; *Burchell v. Burchell*, 96 Misc. 600, 160 N. Y. Supp. 805.

46. *Cosgriff v. Dewey*, 164 N. Y. 1; *Abbey v. Wheeler*, 170 N. Y. 122.

47. *Wilson v. Tailer*, 7 App. Div. 232, 40 N. Y. Supp. 77; *Wright v. Wright*, 59 How. Pr. 176.

premises.⁴⁸ An accounting involves, not only the rents and profits received, but also the payment of taxes and interest on incumbrances, and the cost of improvements and repairs made to the premises by some of the co-tenants.⁴⁹ As a general rule interest is allowed only from the time when the relations between the parties terminated by the sale of the property.⁵⁰

E. Tenants by the entirety.

A husband and wife, as tenants by the entirety of real estate, are each entitled to one-half of the rents and profits thereof.⁵¹ In this respect their rights seem similar to the rights of tenants in common.⁵² Equity will, therefore, exercise jurisdiction of an action of accounting between the husband and wife.⁵³ After a divorce, the parties are tenants in common of real estate in their joint names, and an action of accounting may be maintained as in other cases of tenants in common.⁵⁴ An accounting between husband and wife may include the proceeds of a sale of the premises, where one of the parties has received more than a proper proportionate share thereof.⁵⁵ Unless one party is ousted by the other, there is ordinarily no right to compel one to account to the other for the reasonable value of use and occupancy of the premises.⁵⁶

F. Co-owners of personalty.

A controversy respecting the proceeds or income of personal property owned by several parties can be determined

48. *Willes v. Loomis*, 94 App. Div. 67, 87 N. Y. Supp. 1086; *Adams v. Bristol*, 126 App. Div. 660, 111 N. Y. Supp. 231, affirmed without opinion, 196 N. Y. 510; *Woolever v. Knapp*, 18 Barb. 265; *Dresser v. Dresser*, 40 Barb. 300; *Elwell v. Burnside*, 44 Barb. 447. See also, *Collins v. Collins*, 8 App. Div. 502, 40 N. Y. Super. 902.

49. *Matter of Lucy*, 4 Misc. 349, 54 State Rep. 255, 24 N. Y. Supp. 352.

50. *Minion v. Warner*, 238 N. Y. 413. See also, *Collins v. Collins*, 8 App. Div. 502, 40 N. Y. Supp. 902.

51. *Hiles v. Fisher*, 144 N. Y. 306; *Maekotter v. Maekotter*, 74 Misc. 214, 131 N. Y. Supp. 815.

52. See, *supra*, II-D, Joint tenants or tenants in common.

53. *Messing v. Messing*, 64 App. Div. 125, 71 N. Y. Supp. 717; *Maekotter v. Maekotter*, 74 Misc. 214, 131 N. Y. Supp. 815; *Landes v. Landes*, 129 Misc. 10, 220 N. Y. Supp. 469. See also, *Dolan v. Dolan*, 125 Misc. 849, 211 N. Y. Supp. 507.

54. *Carpenter v. Carpenter*, 130 Misc. 701, 225 N. Y. Supp. 426.

55. *Messing v. Messing*, 64 App. Div. 125, 71 N. Y. Supp. 717.

56. *Landes v. Landes*, 129 Misc. 10, 220 N. Y. Supp. 469.

in an action at law, if the interest of the parties can be determined without an accounting.⁵⁷ If, however, an accounting is necessary, it may be had in a court of equity.⁵⁸ Equitable relief is frequently necessary to adjust the interests of co-owners of a vessel in its proceeds or earnings.⁵⁹ The joint ownership of vessels is governed by rules which are not always applicable to the joint ownership of merchandise or other classes of personalty.⁶⁰

57. *Dyckman v. Valiente*, 42 N. Y. 549; *Warner v. Cecil*, 84 Misc. 21, 145 N. Y. Supp. 902.

58. *Dyckman v. Valiente*, 42 N. Y. 549.

59. *Dyckman v. Valiente*, 42 N. Y. 349; *Whiton v. Spring*, 74 N. Y. 169; *Starbuck v. Farmer's Loan & Trust Co.*, 28 App. Div. 272, 51 N. Y. Supp. 58; *Williams v. Lawrence*, 53 Barb. 320, affirmed 47 N. Y. 462; *Galvin v. Ryan*, 108 N. Y. Supp. 574.

Parties.—Where the interests of tenants in common are distinct and readily ascertainable on an accounting showing the profits, either tenant may demand of his co-tenant having possession of the whole his share, and on a refusal or conversion may sue in his own name, without joining all the other co-tenants. *Kutz v. Richards*, 16 N. Y. Supp. 99, 40 St. Rep. 693.

60. *Williams v. Lawrence*, 47 N. Y. 462.

Special partnership.—Two or more persons owning a ship hold the same as tenants in common, and not as partners, unless they chance to be general partners, and have the ship as a part of their partnership property, and for partnership purposes. But there may be a special partnership between them in respect to the ship, or particular voyages and adventures in its employment and use. And whenever a general partnership, embracing the ownership of the vessel and the business in which she is engaged, or a particular partnership either in respect to the ship or a par-

ticular voyage or adventure exists, all the rules applicable to ordinary partnerships apply, and the rights and liabilities of the co-partners are the same as in mercantile or other business partnerships. *Williams v. Lawrence*, 47 N. Y. 462.

Co-owners of vessel as partners.—Though the part owners of a ship are, generally speaking, tenants in common, yet there may be a special partnership between them in the ship, as well as in the cargo, in regard to a particular voyage, or adventure, and the proceeds arising from the sale of them, and the profits of the voyage. And where, in such a case, one or two owners receive, or gets possession of, the whole proceeds he has a right to retain them until he is paid or indemnified for what he has advanced or paid more than his share, for out-fits, repairs, or expenses of the vessel for the particular voyage or adventure; but not for a general balance of account arising from former and distinct voyages or adventures in which they have been concerned together, in the same, or other vessels, there being no general partnership between them, and each adventure creating a special partnership, by itself, which terminated with the particular adventure. *Mumford v. Nicholl*, 20 Johns. 611.

Interest of assignee.—Where tenants in common of a ship employ her in a series of voyages and lettings of the vessel for hire upon joint account, the earnings and expenditures upon, and in respect to different voyages

G. Trustee and beneficiary.

1. In general.

An action in equity may be brought to settle the accounts of a trustee.⁶¹ The enforcement and control of trusts is one of the earliest subjects over which courts of equity assumed jurisdiction. The beneficiary may maintain an action to compel the trustee to account;⁶² or the trustee may voluntarily seek the settlement of his accounts. If the existence of the trust is disputed, the action may be to establish the trust as well as for an accounting.⁶³ A trustee may also by suit in equity call upon a co-trustee to account.⁶⁴ A trustee who misappropriates trust funds may be sued either at law for a conversion, or in equity for an accounting.⁶⁵ A trustee may be directed to account although it does not appear that there remains in his hands moneys belonging to the beneficiary.⁶⁶ Trustees who received under a will corporate

going into general account, it is a particular or *quasi* partnership for the general employment of the vessel, and the different voyages and adventures are connected together, and parts of the trade or business carried on by the owners as partners. An assignee, therefore, of the interest of one of the joint owners in a particular voyage or adventure can take only the interest which his assignor has in the earnings of the vessel after the adjustment of the partnership accounts. When there is a particular or *quasi* partnership either in respect to fitting out and furnishing a ship, or in respect to a particular voyage or adventure between owners in common, and who are not general partners, their accounts and dealings in respect to other ships or other and entirely distinct voyages and adventures with the same ship, cannot be brought together into one general account so as to defeat the claim of an assignee of one of the common owners of a share of the net proceeds of the one voyage or adventure by applying the same to the payment of balances due upon the other dealings, or of a general balance. *Williams v. Lawrence*, 47 N. Y. 462.

61. *Woodbridge v. First Nat. Bank*, 45 App. Div. 166, 61 N. Y. Supp. 258, affirmed 166 N. Y. 238; *Anderson v. Fry*, 116 App. Div. 740, 102 N. Y. Supp. 112; *Gambold v. MacLean*, 126 Misc. 820, 215 N. Y. Supp. 607; *Reading v. Haggin*, 58 Hun 450, 35 St. Rep. 535, 12 N. Y. Supp. 368.

62. *Wheeler v. Allen*, 51 N. Y. 37; *McKenzie v. Wappler Elec. Co.*, 215 App. Div. 336, 213 N. Y. Supp. 389; *Hamilton v. Faber*, 34 Misc. 75, 69 N. Y. Supp. 434, reversed on other grounds, 60 App. Div. 293, 70 N. Y. Supp. 118; *Morris v. Hughes*, 45 Misc. 278, 92 N. Y. Supp. 288; *Albrecht v. Robert Dollar Co.*, 123 Misc. 640, 205 N. Y. Supp. 721.

63. *Gambold v. MacLean*, 126 Misc. 820, 215 N. Y. Supp. 607.

64. *Wood v. Brown*, 34 N. Y. 337; *Price v. Brown*, 10 Abb. N. C. 67, 60 How. Pr. 511; *Vose v. Galpen*, 18 Abb. Pr. 96.

65. *Tucker v. Weeks*, 177 App. Div. 158, 163 N. Y. Supp. 595; *Pratt v. Commercial Trust Co.*, 105 Misc. 324, 174 N. Y. Supp. 88, affirmed, 188 App. Div. 881, 175 N. Y. Supp. 918.

66. *Seaward v. Davis*, 133 App. Div. 191, 117 N. Y. Supp. 468, modified 198

stock, and who elect themselves as directors of the corporation and manage the same thereafter, may be compelled to account, not only for their custody of the stock and the dividends received, but also for the management of the corporation.⁶⁷

2. Testamentary trustee.

Jurisdiction of the accounts of testamentary trustees, which was once exclusively a matter of equitable cognizance, has almost entirely passed to the Surrogate Courts.⁶⁸ There is no enactment which specifically ousts the Supreme Court of its jurisdiction over the accounting of testamentary trustees; and hence the Supreme Court and the Surrogate's Court may be said to have concurrent jurisdiction of the accounts.⁶⁹ The jurisdiction of the Supreme Court is inherent, while the power of a Surrogate's Court is statutory.⁷⁰ But in a case in which a Surrogate's Court has full power to act and decide all of the questions in controversy, the Supreme Court will not accept jurisdiction.⁷¹ On the other hand, if the Surrogate's Court is without power to determine all the issues involved or to grant all of the relief sought, an action for an accounting may properly be brought in the Supreme Court.⁷² It is only in special and exceptional cases that the Supreme Court now entertains jurisdiction.⁷³

N. Y. 415; *Hamilton v. Faber*, 34 Misc. 75, 69 N. Y. Supp. 434, reversed on other grounds, 60 App. Div. 293, 70 N. Y. Supp. 118; *Reading v. Haggin*, 58 Hun 450, 35 St. Rep. 585, 12 N. Y. Supp. 368.

67. *Farmers Loan & Trust Company v. Pierson*, 130 Misc. 110, 222 N. Y. Supp. 532.

68. *Matter of Kent*, 92 Misc. 113, 155 N. Y. Supp. 383; *Matter of Appell*, 123 Misc. 12, 204 N. Y. Supp. 889.

69. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410, affirmed without opinion, 195 N. Y. 509.

70. *Furniss v. Furniss*, 148 App. Div. 211, 133 N. Y. Supp. 535.

Jurisdiction of surrogate.—Where at the time a testamentary trust went into effect, the trustees, the legal situs of the trust fund, and the fund itself

were all within a county of this state, the surrogate of that county has jurisdiction to settle the accounts of the trustees notwithstanding that the trust was created by the will of a non-resident decedent and no real property within this state is involved. *People ex rel. Safford v. Washburn*, 105 Misc. 415, 173 N. Y. Supp. 157, affirmed 188 App. Div. 951, 176 N. Y. Supp. 833.

71. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410, affirmed without opinion, 195 N. Y. 509.

72. *Fogarty v. O'Reilly*, 56 Misc. 192, 107 N. Y. Supp. 234, affirmed without opinion, 123 App. Div. 923, 107 N. Y. Supp. 1127.

73. *Matter of Appell*, 123 Misc. 12, 204 N. Y. Supp. 889.

The trend of legislation has been to increase the power of surrogates, and hence many decisions can be found of actions which have been successfully maintained in the Supreme Court, but of which such court would not now assume jurisdiction. The maintenance of an action in Supreme Court and a proceeding in Surrogate's Court at the same time will not be countenanced; one of the remedies will be stayed.⁷⁴

If a partition of real estate is necessary for complete relief, the Supreme Court will determine the accounting.⁷⁵ Formerly, the necessity for a construction of the will justified an action in the Supreme Court;⁷⁶ but under the present Surrogate's Court Act, a surrogate has broad power in this respect.⁷⁷ The determination of conflicting claims to real estate was formerly not within the jurisdiction of Surrogate Courts, and hence furnished a reason for an accounting in Supreme Court.⁷⁸

In some cases the action has been maintained in the Supreme Court without objection to that forum.⁷⁹ The objection is one which should not be determined on a motion

74. *Gould v. Gould*, 118 Misc. 576, 195 N. Y. Supp. 113, affirmed, 203 App. Div. 817, 197 N. Y. Supp. 524.

Prior proceeding in Surrogate's Court.—In an action brought by the beneficiary of a trust created by will to require the trustees to render an account and to procure the removal of one of them, an injunction restraining two of the trustees, who had instituted proceedings in the Surrogate's Court to obtain their discharge as trustees, from prosecuting such proceedings until the determination of the action, should not be granted, where it appears that the accounts of the two trustees who desiring to resign are being investigated by referees appointed by the surrogate; that a reference for that purpose has extended over two years and has to a large extent been completed without objection, and that the results and the expense of the proceedings in the Surrogate's Court will be lost if their prosecution is enjoined. *Hamilton v.*

Cutting, 60 App. Div. 293, 70 N. Y. Supp. 118.

75. Partition.—The Surrogate's Court will not take jurisdiction of proceedings to compel an accounting by an executor and trustee where it appears that at the time the proceedings were instituted there was then pending in the Supreme Court an action involving the same issues and where it appears that the question of the partition of the property, which can only be decreed by the Supreme Court, is closely connected with the questions of accounting and is incidental to a proper judgment. *Matter of Appell*, 123 Misc. 12, 204 N. Y. Supp. 389.

76. *Barnes v. Blake*, 58 Hun, 525, 34 St. Rep. 919, 12 N. Y. Supp. 354.

77. *Surr. Ct. Act*, § 145.

78. *Fogarty v. O'Reilly*, 56 Misc. 192, 107 N. Y. Supp. 234, affirmed without opinion, 123 App. Div. 923, 107 N. Y. Supp. 1127.

79. *Furniss v. Furniss*, No. 1, 148 App. Div. 211, 133 N. Y. Supp. 535.

for judgment, but should be determined when the cause is brought to trial.⁸⁰

3. Executor or administrator.

Before the enactment of the Revised Statutes in 1830, the remedy for the settlement of an estate and the distribution thereof was an administration suit by bill in equity.⁸¹ Since that time the powers of Surrogate Courts have been gradually increased until there remains practically no necessity for resort to equity to settle the accounts of an executor or administrator. If complete relief can be afforded in Surrogate's Court, the Supreme Court will decline to entertain a suit for an accounting by such representatives.⁸² While, theoretically, the Supreme Court and the Surrogates' Courts have concurrent jurisdiction, the Supreme Court will insist that estates be settled in the forum particularly adapted to that purpose.⁸³ For many years the Surrogates' Courts had limited powers in construing wills, and when it was desired to have a construction of a will, resort to equity was proper.⁸⁴ But even in such a case, the Supreme Court,

⁸⁰. *Mildeberger v. Franklin*, 130 App. Div. 860, 115 N. Y. Supp. 903.

⁸¹. *Matter of Kent*, 92 Misc. 113, 155 N. Y. Supp. 383; *Matter of Woodward*, 105 Misc. 446, 173 N. Y. Supp. 556, affirmed, 188 App. Div. 888, 175 N. Y. Supp. 926; *Rayner v. Pearsall*, 3 Johns. Ch. 578.

An executor, to whom by the will no authority over real estate was given, who has nevertheless assumed such authority, and received the rents and profits thereof, may be called to account by a creditor of the decedent as trustee. Though such accounting may not be compelled before the surrogate, it can be compelled in this court in an action properly framed for that purpose. In such a case it is not necessary that each creditor should bring a separate action; one may sue for himself and others. *Dana v. Western*, 2 Edm. Sel. Cas. 391.

⁸². *Wager v. Wager*, 89 N. Y. 161; *Hard v. Ashley*, 117 N. Y. 611; *Hynes v. Alexander*, 2 App. Div. 109, 73 State Rep. 216, 37 N. Y. Supp. 527; *Blake*

v. Barnes, 28 Abb. N. C. 401, 45 State Rep. 130, 18 N. Y. Supp. 471; *Strong v. Harris*, 84 Hun 314, 65 St. Rep. 548, 32 N. Y. Supp. 349. "The first observation we make is with respect to the bringing of this action in the Supreme Court. There was no reason for resorting to another forum than that established by the statute for the final settlement of an executor's accounts. No objection appears to have been taken on the record. If it had been made, a grave jurisdictional question would have been presented. We do not wish to be understood, however, as assenting to this procedure. These proceedings belong, by law, to Surrogate's Courts, which were constituted to take jurisdiction of them, and the powers of which are appropriate and adequate for the purpose." *Hard v. Ashley*, 117 N. Y. 606.

⁸³. *Haddow v. Lundy*, 59 N. Y. 320.

⁸⁴. *Blake v. Barnes*, 28 Abb. N. C. 401, 45 State Rep. 130, 18 N. Y. Supp. 471.

after determining the construction of the will, sometimes insisted that further proceedings for an accounting be had in the probate courts.⁸⁵ At the present time the Surrogates' Courts have broad powers in the construction of wills. Where an executor had in his hands at the time of his death rents of the estate, and thereafter the executrix of such administrator continued to collect such rents, it was held that a heir at law of the original estate could maintain a suit to compel such executrix to account, both in her individual and representative capacities.⁸⁶

4. Committee.

An accounting by the committee of an incompetent person is authorized by sections 1378-1381 of the Civil Practice Act.⁸⁷ Although a special proceeding may be maintained for the settlement of the committee's account, it has been thought that the Supreme Court, by virtue of its inherent power over the accounts of a committee, may determine an action in equity brought for that purpose.⁸⁸

5. Guardian and ward.

A settlement of the accounts of a general guardian is ordinarily had under Article 14 of the Surrogate's Court Act. It is only when the Surrogate's Court cannot afford full relief that the Supreme Court will exercise its inherent power over the accounts of a guardian. When the infant seeks to rescind a general release given by him to the guardian as well as an accounting, it may be proper to bring a suit in the Supreme Court for relief.⁸⁹

85. *Vanderveer v. McKane*, 25 Abb. N. C. 105, 11 N. Y. Supp. 808.

86. *Budd v. Hardenbergh*, 36 Misc. 90, 72 N. Y. Supp. 537.

87. See Vol. 1, *Fiero on Particular Actions and Proceedings*, page 335.

88. *Downing v. Whitney*, 46 App. Div. 307, 61 N. Y. Supp. 540.

89. See *O'Connor v. O'Connor*, 202 App. Div. 7, 195 N. Y. Supp. 308.

Special guardian and sureties.—As a general rule, before an action at law can be maintained against the sureties upon a bond of a special guardian, there should be an accounting before

some court having jurisdiction of the subject-matter establishing the default of the principal, and the extent thereof. But where it appears that a special guardian of infants has received and misappropriated moneys for which he is accountable, that his whereabouts cannot be ascertained, and that he is wholly insolvent, equity will entertain a suit against him and his sureties to determine the extent of his default and recover such deficiency. *Duck v. McGrath*, 160 App. Div. 482, 145 N. Y. Supp. 1033, affirmed on opinion below, 212 N. Y. 600.

6. Assignee for creditors.

An accounting of a general assignee for the benefit of creditors is normally conducted under section 15 of the Debtor and Creditor Law.⁹⁰ If one seeking an accounting by an assignee can secure all the relief desired under the Debtor and Creditor Law, the Supreme Court will not entertain an action in equity instituted for the purpose of such an accounting.⁹¹ The Supreme Court has jurisdiction of an action for an accounting;⁹² but will refuse to exercise its power unless some cogent reason for its action is shown.⁹³

7. Treasurer of fund.

Where several persons are interested in a fund which is held by one as treasurer, there may exist such a confidential relation between the parties that the treasurer may be called upon to account in an action in equity. Thus, a person in whose hands there was placed a fund raised by the officers of a regiment for the benefit of the sick and needy members of the regiment, may be required to account.⁹⁴ Where several persons enter upon the construction of certain houses and agree that one of them shall act as treasurer, he is bound to account to the others.⁹⁵ Where a husband gives to his wife all of his earnings to apply the same to the expenses of maintaining their home and to keep the remainder for his benefit and use, a trust is created which may be enforced, and one having the trust funds in his hands as a representative of the wife may be required to deliver them to the husband.⁹⁶

90. See Vol. 2, *Fiero on Particular Actions and Proceedings*, page 1030.

91. *Hynes v. Alexander*, 2 App. Div. 109, 73 State Rep. 216, 37 N. Y. Supp. 527.

92. *Noyes v. Wernberg*, 15 N. Y. Week. Dig. 72.

A judgment creditor may maintain an action to compel an accounting by the assignee of a judgment debtor, now deceased, for moneys which it is alleged were given to the assignee without consideration and with an intent to defraud creditors, and also to set aside a release given to the assignee by the administratrix of the judgment

debtor for an inadequate consideration and induced by fraud. *Morrison v. Sheinbaum*, 193 App. Div. 712, 184 N. Y. Supp. 487.

93. *Stoerzer v. Nolan*, 19 App. Div. 338, 46 N. Y. Supp. 587, appeal dismissed 155 N. Y. 667.

94. *Walton v. Stewart*, 40 State Rep. 796, 16 N. Y. Supp. 38, affirmed on opinion below, 129 N. Y. 667.

95. *White v. Rankin*, 18 App. Div. 293, 46 N. Y. Supp. 228, affirmed without opinion, 162 N. Y. 622.

96. *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339.

8. Implied trustee.

An implied, as well as an express, trustee may be required to account in equity.⁹⁷ A constructive trustee, or a trustee *de son tort*, may be required to account.⁹⁸ A wrongdoer may in some cases be held as a trustee and required to account.⁹⁹ An action in equity may be maintained to require a thief or his representative to render an account regarding the stolen property.¹ If one knowingly receives stolen goods and disposes of them at a price unknown to the true owner and the receiver refuses to account for sums received by him, although the owner may have a remedy in an action at law, he will, nevertheless, be permitted to maintain an action to compel an accounting of the proceeds.² A person acquiring personal property by fraud, or his representative or general assignee, may be required to account for the proceeds thereof.³

A banking corporation which permits a trustee to misappropriate the trust funds on deposit in such bank, may be chargeable as a trustee *de son tort*.⁴ In such an action the burden is not upon the bank to establish the character of the deposits.⁵ The plaintiff must establish the trust nature of the deposits, and that the bank appropriated the funds

97. *Fur & Wool Trading Co., Ltd. v. Fox*, 245 N. Y. 215.

98. *Woodbridge v. First Nat. Bank*, 45 App. Div. 166, 61 N. Y. Supp. 258, affirmed, 166 N. Y. 238; *Tucker v. Weeks*, 177 App. Div. 158, 163 N. Y. Supp. 595; *Fletcher v. Manhattan L. Ins. Co.*, 197 App. Div. 484, 189 N. Y. Supp. 453.

Bulk Sales Law.—One to whom a stock of goods is transferred in violation of section 44 of the Personal Property Law is accountable to the creditors of the transferor, and an action for an accounting may be maintained by his trustee in bankruptcy. *Costello v. Emmick*, 122 Misc. 114, 203 N. Y. Supp. 123.

99. *Newton v. Porter*, 69 N. Y. 133; *Fur & Wool Trading Co. v. Fox*, 245 N. Y. 215.

Rents from infant's lands.—Where one assumes to be guardian, or the agent of a guardian, and, as such,

enters on the infant's land, and receives the rents, the infant may elect to consider him a wrong doer, and bring trespass, or charge him as guardian; and if the infant waive the tort; his only remedy is by action of account or bill in equity. *Sherman v. Ballou*, 8 Cowen 304.

1. *Lightfoot v. Davis*, 198 N. Y. 261.

2. *Fur & Wool Trading Co., Ltd. v. Fox*, 245 N. Y. 215.

3. *American Sugar Refining Co. v. Fancher*, 145 N. Y. 552; *Bird v. Lanphear*, 11 App. Div. 613, 42 N. Y. Supp. 623; *Clark v. Gilmore*, 149 App. Div. 445, 133 N. Y. Supp. 1047.

4. *Pratt v. Commercial Trust Co.*, 105 Misc. 324, 174 N. Y. Supp. 88, affirmed, 188 App. Div. 881, 175 N. Y. Supp. 918.

5. *Woodbridge v. First Nat. Bank*, 45 App. Div. 166, 61 N. Y. Supp. 258, affirmed, 166 N. Y. 238.

for its private benefit or assisted the trustee in appropriating them for his benefit.⁶

A vendor of real estate who receives for the individual account of an executrix the funds of the estate, knowing they are trust funds, thereby becomes a trustee by operation of law and is accountable as such.⁷

A resulting trustee, as limited by section 94 of the Real Property Law, may be chargeable in an action of accounting. Thus, a grant of real property to one person, the consideration being paid by another, may create a resulting trust, where the conveyance is taken without the consent of the person paying the consideration.⁸ The person taking the conveyance under such circumstances may be liable to account in a suit in equity.⁹ Or, if several persons interested in a judicial sale of real property combine their interests and one party does the bidding and takes the title in his own name, if he thereafter refuses to recognize the interests of his associates, he may be compelled to account.¹⁰

9. Parties.

An action for a voluntary accounting may be brought by a trustee. Or an action for involuntary accounting against the trustee may be commenced by a beneficiary of the trust,¹¹ or by the personal representative of such a beneficiary. A contingent remainderman may require a testamentary trustee to account.¹²

All of the persons directly interested in the trust should be parties.¹³ This includes all of the trustees,¹⁴ or, in case

6. *Taylor v. Astor Nat. Bank*, 105 Misc. 386, 174 N. Y. Supp. 279.

Conclusion of law.—An allegation in the complaint that the defendant bank participated in the unlawful diversion and misappropriation of the trust fund by the trustee, is a conclusion of law which, unless, supported by other allegations of fact, cannot make a cause of action. *Taylor v. Astor Nat. Bank*, 105 Misc. 386, 174 N. Y. Supp. 279.

7. *Tucker v. Weeks*, 177 App. Div. 158, 163 N. Y. Supp. 595.

8. *Waters v. Hall*, 218 App. Div. 149, 218 N. Y. Supp. 31, affirmed, 244 N. Y. 557; *Tabor v. Hills*, 128 Misc. 151, 218 N. Y. Supp. 323.

9. *Tabor v. Hills*, 128 Misc. 151, 218 N. Y. Supp. 323.

10. *Fletcher v. Manhattan L. Ins. Co.*, 197 App. Div. 484, 189 N. Y. Supp. 453.

11. *Morris v. Hughes*, 45 Misc. 278, 92 N. Y. Supp. 288.

12. *Furniss v. Furniss*, 148 App. Div. 211, 133 N. Y. Supp. 535.

13. *Leonard v. Barnum*, 94 App. Div. 266, 87 N. Y. Supp. 978, affirmed, 182 N. Y. 431; *Wisner v. Blachly*, 1 Johns. Ch. 437; *Petrie v. Petrie*, 7 Lans. 90; *Pritchard v. Hicks*, 1 Paige 270; *Hallett v. Hallett*, 2 Paige 15.

14. *Hamilton v. Faber*, 33 Misc. 64, 68 N. Y. Supp. 144; *Sherman v. Burn-*

of the death of a trustee, his executor or administrator.¹⁵ As a general rule, all of the *cestui que trustent* should be joined as defendants.¹⁶ But, if a will creates several distinct trusts, in an action by the beneficiary of one trust, it is not necessary to join as defendants the beneficiaries of the other trusts.¹⁷ The creator of trust, or his representative, is not ordinarily a necessary party.¹⁸

The plaintiff may join, not only the necessary parties, but also any person who has or claims an interest in the controversy adverse to the plaintiff.¹⁹ It is proper to bring in all the parties to be affected by the decree.²⁰ An assignee of a beneficiary may be brought in as a party.²¹ A personal

ham, 6 Barb. 403; Fabre v. Colden, 1 Paige 166.

Individual capacity.—A trustee can be called upon to account only in his representative capacity. Leonard v. Barnum, 94 App. Div. 266, 87 N. Y. Supp. 978.

15. Gould v. Gould, 122 Misc. 152, 203 N. Y. Supp. 399, affirmed, 209 App. Div. 155, 204 N. Y. Supp. 123; Silsbee v. Smith, 60 Barb. 372, 41 How. Pr. 418; McCready v. Farmers' Loan & Trust Co., 70 Hun 394, 53 St. Rep. 801, 24 N. Y. Supp. 57; Petrie v. Petrie, 7 Lans. 90.

16. Sherman v. Burnham, 6 Barb. 403; Brown v. Ricketts, 3 Johns. Ch. 553; Petrie v. Petrie, 7 Lans. 90; Fabre v. Colden, 1 Paige 166; Hallett v. Hallett, 2 Paige 15. See also, Wing v. Bull, 38 Hun 291.

Other beneficiaries.—Where an intestate's personal property and rents have been collected by his administrator and, the latter having died without accounting, his executrix collects other rents falling due upon the real estate of the intestate, one of the heirs at law and next of kin of the intestate may sue for all other similarly situated to compel the executrix to account, both in her individual and representative capacities, for said property, and need not make the other heirs and next of kin parties where they are numerous and reside without

the state of New York. Budd v. Hardenburgh, 36 Misc. 90, 72 N. Y. Supp. 537.

17. Steinway v. Steinway, 36 Misc. 294, 73 N. Y. Supp. 497, affirmed, 78 App. Div. 207, 79 N. Y. Supp. 541.

18. Morris v. Hughes, 45 Misc. 278, 92 N. Y. Supp. 288.

19. Sheldon v. Whitehouse, 60 Misc. 161, 112 N. Y. Supp. 1079.

20. Donnelly v. Lambert, 62 App. Div. 189, 70 N. Y. Supp. 963.

Corporation.—In an action to compel an accounting and to remove the executrix and trustee on the ground that an investment in the stock of a corporation was improper, the application by the corporation to be made a party defendant should have been granted, where the answer alleges that the action is based on a conspiracy to compel the immediate sale of the shares of stock which represent a voting control in the corporation, and to destroy the estate and injure the corporation. In view of the answer and the supporting affidavit, it is apparent that the corporation is vitally interested in the outcome of the case and should be permitted to defend itself. Lyons v. Wyld, 216 App. Div. 116, 214 N. Y. Supp. 666.

21. Barnes v. Blake, 58 Hun 525, 34 St. Rep. 919, 12 N. Y. Supp. 354.

Divorced wife of beneficiary.—In an action brought by trustees of a testa-

representative, or a legatee,²² of a deceased beneficiary may be a proper party, and is frequently a necessary party.²³ One, who, it is claimed, has wrongfully secured a part of the trust estate may be joined as a defendant, and an adjudication as to his title may be had.²⁴ In an action by a trustee for a settlement of his accounts, one whom he has employed as attorney and who had rendered services for the benefit of the estate, but who is not satisfied to accept the compensation the trustee is willing to pay him, may be joined as a defendant, to the end that his reasonable compensation may be determined.²⁵

H. Principal and agent.

1. In general.

The mere relation of principal and agent does not authorize an action in equity to determine the state of their accounts.²⁶ But, where the agency is of such a character as creates in the agent a trusteeship, the principal becomes a *cestui que trust*, and the obligation of the agent to the principal is fiduciary in character.²⁷ If the relation between them is of a fiduciary nature, the agent can be required to

mentary trust for the purpose of securing a judicial settlement of their accounts and to obtain the direction of the court as to the proper apportionment between principal and income of stock dividends received by the trustees, an application by a divorced wife of one of the beneficiaries to be made a party defendant should be granted, where it appears that the will provided that in the case of the death of a beneficiary leaving him surviving a wife "born" before the death of the testator, one-third of the income of the share of the beneficiary should be paid to the wife; that the parties were divorced after the death of the testator; that the wife has procured an order sequestrating the funds of the estate to the extent of compelling the trustees to deduct from her ex-husband's account an amount sufficient to pay permanent alimony; that the wife has instituted proceedings at the foot of the divorce decree for addi-

tional alimony claimed to be due on the ground of fraud and that if she succeeds the amount recovered by her in addition to the regular alimony will be more than sufficient to absorb the entire income of her husband's share for a considerable period. *Metropolitan Trust Co. v. Bishop*, 206 App. Div. 164, 200 N. Y. Supp. 649, appeal dismissed, 237 N. Y. 607.

22. *Sheldon v. Whitehouse*, 60 Misc. 161, 112 N. Y. Supp. 1079.

23. *Peyser v. Wendt*, 87 N. Y. 322.

24. *Pell v. Folger*, 68 Hun 443, 52 State Rep. 682, 23 N. Y. Supp. 42.

25. *Beekman v. Beekman*, 74 Misc. 540, 134 N. Y. Supp. 454.

26. *Marvin v. Brooks*, 94 N. Y. 71; *Conger v. Judson*, 69 App. Div. 121, 74 N. Y. Supp. 504; *McCullough v. Pence*, 85 Hun 271, 66 St. Rep. 470, 32 N. Y. Supp. 986.

27. *Jordan v. Underhill*, 91 App. Div. 124, 86 N. Y. Supp. 620.

account in equity for property intrusted to him.²⁸ The general agent of an insurance company, who is required to render periodical statements or accounts, stands in a fiduciary relation to the company, and may be required to account in an equitable action for that purpose.²⁹ A gen-

28. *Walker v. Spencer*, 86 N. Y. 162; *Marvin v. Brooks*, 94 N. Y. 71; *Cornwell v. Clement*, 10 App. Div. 446, 42 N. Y. Supp. 295; *Frethy v. Durant*, 24 App. Div. 58, 48 N. Y. Supp. 839; *Hotel Register Co. v. Osborne*, 84 App. Div. 307, 82 N. Y. Supp. 609; *Rogers v. Wheeler*, 89 App. Div. 435, 85 N. Y. Supp. 981; *Potomac Ins. Co. v. Kelly*, 173 App. Div. 791, 160 N. Y. Supp. 161; *Cornell v. Bonsall*, 176 App. Div. 798, 163 N. Y. Supp. 384; *Baum v. Lamborn*, 203 App. Div. 86, 196 N. Y. Supp. 478; *Morrison v. Chapman*, 63 Misc. 195, 116 N. Y. Supp. 522; *Factors F. Ins. Co. v. Whilden*, 92 Misc. 558, 156 N. Y. Supp. 362; *Westwood v. Model Brassiere Co.*, 131 Misc. 790, 229 N. Y. Supp. 21; *Day v. Stone*, 15 Abb. Pr. N. S. 137; *Ellas v. Lockwood*, *Clarke* 311; *Parker v. Turner*, 8 St. Rep. 500; *Siedler v. Bell*, 47 St. Rep. 411; *Crosbie v. Leary*, 19 Super. Ct. (6 Bosw.) 312; *Walker v. Spencer*, 45 Super. Ct. (13 J. & S.) 71. "The plaintiff intrusted defendant with the management of a portion of its business, and while acting in that capacity he was the agent of the plaintiff, and the money he received he held as its trustee and could be compelled to account therefor. (*Schantz v. Oakman*, 163 N. Y. 148.) He agreed to keep true and accurate accounts of what he did, give daily reports, and that all books and other data kept should be the property of the plaintiff. He not only refuses to turn over the moneys collected or to account therefor in any way, but he also refuses to turn over the books and papers kept by him. Under such circumstances, we are of the opinion that a proper case was presented for the exercise of the

equitable power of the court to compel him to render an account." *Hotel Register Co. v. Osborne*, 84 App. Div. 307, 82 N. Y. Supp. 609.

Patent.—A complaint alleging that plaintiff intrusted defendant with the full description of her invention for the purpose of obtaining letters patent in plaintiff's name states a good cause of action in equity for an accounting. Defendant's abuse of the confidence reposed in it entitled plaintiff to sue in equity, the allegations of the complaint having established a fiduciary relationship. *Westwood v. Model Brassiere Co.*, 131 Misc. 790, 229 N. Y. Supp. 21.

Negotiable securities.—Where a principal has executed and deposited with his agent negotiable obligations to be issued by the latter in certain contingencies which do not occur, and the agent refuses to return them on demand, an action in equity may be maintained by the principal against the agent to compel a surrender of the obligations, and for damages arising from the detention, or, in case a surrender cannot be made, for the value of the instruments as valid obligations. *Western R. Co. v. Bayne*, 75 N. Y. 1.

Reimbursement of agent.—"It is well settled law that an agent is entitled to reimbursement from his principal for expenses or damages incurred by him as a necessary incident to the proper conduct of his agency, including the cost of defending an action or adjusting a claim." *Herman v. Leland*, 84 Misc. 82, 145 N. Y. Supp. 972.

29. *Potomac Ins. Co. v. Kelly*, 173 App. Div. 791, 160 N. Y. Supp. 161; *Ins. Co. of N. A. v. Whitlock*, 216 App. Div. 78, 214 N. Y. Supp. 697; *Factors*

eral agent of a manufacturing company employed to sell its products and thereby receiving money of his principal, may be required to account.³⁰ But the remedy for failure to perform the services contracted for is in damages, not in an accounting.³¹

2. Broker.

A customer may sue stock brokers in equity for an accounting as to their dealings.³² Commodity brokers as well as security brokers are under an obligation to account to their customers.³³ Where one advances money to brokers to invest in securities, the relation is fiduciary, and equity will take jurisdiction of an action to compel the brokers to account.³⁴ If the transactions are not actually consummated, but are fictitious, the broker may be compelled to return the customer's deposit.³⁵ A broker purchasing securities for

F. Ins. Co. v. Whilden, 92 Misc. 558, 156 N. Y. Supp. 362.

30. *Haebler v. Luttgen*, 2 App. Div. 390, 73 St. Rep. 376, 37 N. Y. Supp. 794, affirmed without opinion, 158 N. Y. 693; *Oneida Steel Pulley Co. v. N. Y. Leather Belting Co.*, 120 App. Div. 625, 105 N. Y. Supp. 534; *Walker v. Spencer*, 45 Super. Ct. (13 J. & S.) 71. See also, *Porter v. Union Blue Stone Co.*, 121 N. Y. 324.

31. *McLellan v. Goodwin*, 43 App. Div. 148, 59 N. Y. Supp. 290.

32. *Lipkien v. Krinski*, 192 App. Div. 257, 182 N. Y. Supp. 454; *Haight v. Haight & Freese Co.*, 46 Misc. 501, 93 N. Y. Supp. 934, affirmed, 112 App. Div. 475, 98 N. Y. Supp. 471, affirmed without opinion, 190 N. Y. 540; *Lavers v. Hutton*, 122 Misc. 516, 203 N. Y. Supp. 235.

33. *Miller v. Kent*, 60 How. Pr. 388.

34. *Haight v. Haight & Freese Co.*, 112 App. Div. 475, 98 N. Y. Supp. 471, affirmed without opinion, 190 N. Y. 540; *Lipkien v. Krinski*, 192 App. Div. 257, 182 N. Y. Supp. 454; *McDonogh v. Paine*, 212 App. Div. 572, 209 N. Y. Supp. 440; *Keys v. Leopold*, 213 App. Div. 760, 210 N. Y. Supp. 406, reversed on other grounds, 241 N. Y. 189; *Bat-*

terson v. Raymond, 87 Misc. 229, 149 N. Y. Supp. 706, modified on other grounds, 165 App. Div. 954, 150 N. Y. Supp. 1076; *Second Nat. Bank v. Kean*, 203 N. Y. Supp. 909.

Assignee for creditors.—An action by the assignee for the benefit of creditors for an accounting by stockholders with whom the assignor had dealings cannot be maintained, where it appears that all the dealings between the assignor and the brokers were for the benefit of the assignor's clients, and that all moneys and securities received by the brokers from the assignor were the moneys and securities of the assignor's clients, and where it is not shown that the assignor had any beneficial interest in the credit balance in the hands of the brokers or in the account kept in the assignor's name by them, or that he made any purchase of securities or other property through them on his own behalf. *Gillespie v. VanBuren*, 208 App. Div. 242, 203 N. Y. Supp. 557.

35. *Haight v. Haight & Freese Co.*, 112 App. Div. 475, 98 N. Y. Supp. 471, affirmed without opinion, 190 N. Y. 540.

another broker may be compelled by the latter to account, although the securities are purchased for his customer.³⁶

Where two parties open a joint account with a stock broker he is not obliged, at the direction of one of such parties, to cancel their joint liability and accept as a substitute therefor the separate liability of each party for one-half of the joint liability. After giving such direction one of such parties cannot, without joining the other party, maintain an action against the stock broker in respect to the account in the absence of an allegation in the complaint that the stock broker had complied or agreed to comply with the direction respecting the severance of the joint account.³⁷

3. Factor.

A factor, under whose control commodities are placed for purposes of sale, stands in a fiduciary relation to the owner, and may be compelled to account in equity for the proceeds. A suit for the settlement of the accounts may be maintained by the principal, or the factor or his representative may sue for the settlement of the accounts.³⁸ One to whom works of art are consigned for sale, may be required to account to the consignor.³⁹ A consignor of merchandise may, before sales by the consignee, revoke the consignment and demand a return of the goods, he offering to pay the charges and expenses of the consignee, and if his demand is refused, he may maintain an action in equity for an accounting and a return of the goods.⁴⁰

4. Attorney-in-fact.

An attorney-in-fact who has received money or property in a fiduciary capacity may be required to account in an equitable action for that purpose.⁴¹ Where the agency is of

36. *Lipkien v. Krinski*, 192 App. Div. 257, 182 N. Y. Supp. 454.

37. *Levy v. Popper*, 104 App. Div. 457, 93 N. Y. Supp. 842.

38. *Wilson v. Mallett*, 6 Super. Ct. (4 Sandf.) 112; *Charley v. Watson*, 23 Week. Dig. 189.

39. *Beskow v. Halow*, 223 App. Div. 434, 229 N. Y. Supp. 835.

40. *Pam v. Vilmar*, 54 How. Pr. 235.

41. *Cornwall v. Clement*, 10 App.

Div. 446, 42 N. Y. Supp. 295; *Rose v. Durant*, 44 App. Div. 381, 61 N. Y. Supp. 15; *Duff v. Blair*, 74 App. Div. 364, 77 N. Y. Supp. 444; *Jordan v. Underhill*, 91 App. Div. 124, 86 N. Y. Supp. 620; *Anderson v. Fry*, 116 App. Div. 740, 102 N. Y. Supp. 112; *Reading v. Haggin*, 58 Hun 450, 12 N. Y. Supp. 368, 35 St. Rep. 585.

Interpretation of power of attorney.—Where a power of attorney, pre-

such a character as creates in the agent a trusteeship, the principal becomes a *cestui que trust*, and the obligation of the agent to the principal is fiduciary in character.⁴² When a person entitled to a share in an estate gives to another a power of attorney authorizing him to receive and invest such share, the instrument creates the relation of trustee and *cestui que trust*.⁴³ One managing real estate under a power of attorney is properly subjected to an accounting.⁴⁴ But, if there is no dispute about the correctness of the account, and the controversy arises out of an alleged improper investment of funds in the hands of the attorney, it has been said that the remedy is an action at law.⁴⁵

5. Attorney and client.

While other remedies are available to a client who fails to secure a settlement with his attorney,⁴⁶ there may, nevertheless, in some cases, be a remedy in an equitable action for an accounting. If the attorney has received the property of his client in a fiduciary capacity, he may be required to account,⁴⁷ and in the action the claim of the attorney, if any, may be adjudicated.⁴⁸ But, if, on the other hand, in respect to a transaction, the attorney is merely a creditor of the

pared by a brother and presented by him to his sister, with the representation that it constitutes him her agent and attorney in respect to all the property left by their deceased father, is executed by the sister without legal advice, and on the faith of the representation, and she thereafter acts on the belief that she has conferred upon the brother the exclusive management of her father's estate and of her interest therein, she is, in an action to compel him to account for his management of the estate, entitled to have the power of attorney construed in the light of such representation, and not by the strict terms of the instrument. *Rose v. Durant*, 44 App. Div. 381, 61 N. Y. Supp. 15.

42. *Frethy v. Durant*, 24 App. Div. 58, 48 N. Y. Supp. 839; *Jordan v. Underhill*, 91 App. Div. 124, 86 N. Y. Supp. 620.

43. *Anderson v. Fry*, 116 App. Div. 740, 102 N. Y. Supp. 112.

44. *Reading v. Haggin*, 58 Hun 450, 12 N. Y. Supp. 368, 35 St. Rep. 585; *Bartlett v. Bunn*, 28 St. Rep. 373, 8 N. Y. Supp. 155.

45. *Mersereau v. Bennett*, 62 Misc. 356, 115 N. Y. Supp. 20.

46. See *Fiero on Particular Actions and Proceedings*, Chapter on Attorneys.

47. *United States Title Guaranty Co. v. Brown*, 166 App. Div. 688, 152 N. Y. Supp. 470, affirmed without opinion, 217 N. Y. 628; *Rockefeller v. Kellas*, 222 App. Div. 368, 226 N. Y. Supp. 325; *Tiffany v. Hess*, 67 Misc. 258, 122 N. Y. Supp. 482, affirmed without opinion, 140 App. Div. 933, 125 N. Y. Supp. 1147. See also, *West v. Brewster*, 3 Super. (1 Duer) 647.

48. *Rockefeller v. Kellas*, 222 App. Div. 368, 226 N. Y. Supp. 325.

client, or if he is holding the client's property merely as a bailee, there is no such fiduciary relation as is required to justify an action of accounting.⁴⁹ The remedy is then at law to recover the debt or the property.⁵⁰ Likewise, an attorney cannot sue in equity for an accounting as to moneys he has paid and services he has rendered for a client, for the sole remedy in such a case is an action at law.⁵¹ But, if the attorney has received property of his client as security for expenses and services, he may sue in equity for a settlement of the account between the parties, and for an adjudication of his lien on the property.⁵²

6. Real estate agent.

One who has charge of the real estate of another, collecting the rents and income, and paying the taxes, repairs and other expenses may be deemed to stand in a fiduciary relation to the owner, and hence may be compelled to account in equity.⁵³ A brother assuming charge of his sister's property may, in a proper case, be required to account.⁵⁴ But the remedy to compel a real estate broker to pay a percentage of his commissions to a party procuring a purchaser is an action at law, not an action for an accounting.⁵⁵

I. Corporate organization and management.

1. In general.

The officers of a corporation may be compelled to account under sections 90 or 91a of the General Corporation Law for their official conduct.⁵⁶ The right to compel a director to account for secret profits made in violation of his trust is peculiarly the province of courts of equity.⁵⁷

49. Model Bldg. & Loan Assn. v. Reeves, 236 N. Y. 331; N. Y. Life Ins. Co. v. Hamilton, 52 Misc. 189, 102 N. Y. Supp. 771.

50. Model Bldg. & Loan Assn. v. Reeves, 236 N. Y. 331.

51. Lynch v. Willard, 6 Johns. Ch. 342.

52. VanDoren v. Mackenzie, 190 App. Div. 847, 180 N. Y. Supp. 778, affirmed, 232 N. Y. 587.

53. Frethy v. Durant, 24 App. Div.

58, 48 N. Y. Supp. 839; Ellis v. Lockwood, Clarke 311.

54. Frethy v. Durant, 24 App. Div. 58, 48 N. Y. Supp. 839.

55. Hart v. L. D. Garrett Co., 87 App. Div. 536, 84 N. Y. Supp. 774.

56. For a discussion of these sections and the actions thereunder see Vol. 1, Fiero on Particular Actions and Proceedings, pages 706-730.

57. Woolson Spice Co. v. Columbia Trust Co., 110 Misc. 687, 181 N. Y. Supp. 149.

2. Corporation to stockholder.

Ordinarily there is no duty on the part of a corporation to account to one of its stockholders. Actions at law and the statutory remedies against its officials will ordinarily fully protect the interests of stockholders. Yet there are circumstances under which an action of accounting may be maintained by a stockholder against the corporate entity. Thus, where the corporation seeks to forfeit stock under section 68 of the Stock Corporation Law for failure to pay subscription installments, and it appears that the books of the corporation are confused, and the stock has no definite market value, the stockholder may maintain an equitable action to enjoin the forfeiture and for an accounting to determine how much he owes the corporation.⁵⁸

3. Insurance company to policy holder.

Although a policy holder may be entitled to dividends upon his policy, he is not permitted to maintain an action of accounting against the insurance company for the purpose of determining his share of the profits and accumulations of the company.⁵⁹ The relation between the company and the assured is that of debtor and creditor, not trustee and beneficiary.⁶⁰ Whatever right an assured may have is to be determined in an action at law.⁶¹ This is particularly true when the policy stipulates that the assured ratifies and accepts any determination made by the company as to the amount to be apportioned to the policy.⁶²

4. Promoter.

A promoter of a corporation may be required to account for any secret profit made by him.⁶³ It is only where the

58. *Schuetz v. German-American Real Est. Co.* 21 App. Div. 163, 47 N. Y. Supp. 500.

59. *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421; *Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19; *McCormack v. Security Mut. L. Ins. Co.* 220 N. Y. 447; *Silverman v. Pittsburgh Life & Trust Co.*, 176 App. Div. 749, 163 N. Y. Supp. 1011; *Watts v. Equitable Life Assur. Soc.*, 55 Misc. 454, 105 N. Y. Supp. 363; *Buford v. Equitable Life Assur. Soc.*, 98 N. Y. Supp. 152.

60. *Uhlman v. New York L. Ins. Co.*, 109 N. Y. 421; *Silverman v. Pittsburgh Life & Trust Co.*, 176 App. Div. 749, 163 N. Y. Supp. 1011; *Watts v. Equitable Life Assur. Soc.*, 55 Misc. 454, 105 N. Y. Supp. 363.

61. *Hackett v. Equitable Life Assur. Soc.*, 50 App. Div. 266, 63 N. Y. Supp. 1092.

62. *Greeff v. Equitable Life Assur. Soc.*, 160 N. Y. 19; *Silverman v. Pittsburgh L. & T. Co.*, 176 App. Div. 749, 163 N. Y. Supp. 1011.

63. *Getty v. Devlin*, 70 N. Y. 504;

promoter informs every subscriber that he is personally interested in and of the amount of profit he expects to make on a sale to the corporation, that the promoter will be permitted to retain or make a profit on such sale; and the burden is upon him to show that he took no advantage of his fellow subscribers or stockholders.⁶⁴

5. Syndicate.

A syndicate formed for the promotion of a corporation or for the marketing or dealing in its securities may be classed as a "joint adventure," or "*quasi*-partnership," and an action in equity is a proper remedy for the settlement of the accounts of the members.⁶⁵ But an agreement to form a syndicate does not confer on the parties such a relation of trust or agency as is necessary as the basis for an action of accounting.⁶⁶

6. Liquidating officers.

Upon the dissolution of a corporation, its directors, unless other persons are designated by law, or by a court of competent jurisdiction, are trustees for its creditors and stockholders.⁶⁷ They are accountable as such to the creditors or stockholders for all corporate property which has come into their hands. A trustee in bankruptcy of a stockholder of a national bank which has ceased business and is in liquidation may maintain an action of accounting against the bank, its stockholders and its liquidating committee.⁶⁸

7. Creditors' Committee.

A committee representing the bond holders of a corporation in financial difficulty stands in a fiduciary relation to those bond holders who have deposited their securities with it, and may be required to account.⁶⁹ An action in equity

Colton Improvement Co. v. Richter, 26 Misc. 26, 55 N. Y. Supp. 486.

64. Colton Improvement Co. v. Richter, 26 Misc. 26, 55 N. Y. Supp. 486.

65. Logan v. Moore, 54 N. Y. Supp. 462, 27 N. Y. Civ. Proc. 241, affirmed without opinion, 50 App. Div. 628, 64 N. Y. Supp. 1141. See also, Clark v. Coler, 182 App. Div. 712, 170 N. Y. Supp. 416, affirmed without opinion,

229 N. Y. 558. And see, supra, II-C, "Joint Adventurers."

66. Schantz v. Oakman, 163 N. Y. 148.

67. General Corp. Law, § 35.

68. Brown v. Deposit National Bank, 125 Misc. 247, 211 N. Y. Supp. 366.

69. Mabie v. Seymour, 80 Misc. 280, 140 N. Y. Supp. 1097, affirmed without opinion, 158 App. Div. 952, 143 N. Y. Supp. 1129.

for an accounting lies on behalf of a creditor of a defunct corporation against the members of a committee of creditors thereof who have received money from the plaintiff in trust to protect the interests of creditors and who are charged with wasting and squandering the same.⁷⁰

8. Unincorporated association.

An unincorporated association, although it is recognized by statute and is a legal entity to the extent that an action may be maintained against it, where it is composed of seven or more persons, by suing the president or treasurer of the association, is, nevertheless, as between the members, to be treated as a partnership.⁷¹ Any member of the association may maintain an action in equity for the purpose of recovering his share of the assets, for an accounting, and for a dissolution of the association, together with a sale of the property and distribution of the assets.⁷² A managing member of the association may be required to account for property of the association which he has appropriated or transferred to himself.⁷³

9. Cemetery association.

A certificate of indebtedness issued by a cemetery association under section 97 of the Membership Corporations Law, is to be paid from the proceeds of sales of lots and plats. A holder of such a certificate is not authorized to maintain an action at law against the association for a money judgment. An action in equity for an accounting and for the *pro rata* application of moneys received from the sale of lots is the only remedy.⁷⁴

J. Debtor and Creditor.

1. In general.

The mere relation of debtor and creditor does not justify an action in equity by the creditor for an accounting.⁷⁵

70. Biddle Purchasing Co. v. Snyder, 109 App. Div. 679, 96 N. Y. Supp. 356.

71. Ludlum v. Wagner, 212 App. Div. 779, 209 N. Y. Supp. 540. See General Associations Law, § 13. And see, Vol. 4, Fiero on Particular Actions and Proceedings, page 3526.

72. Ludlum v. Wagner, 212 App. Div. 779, 209 N. Y. Supp. 540; Snyder v.

Lindsey, 92 Hun 432, 36 N. Y. Supp. 1037, 72 St. Rep. 439, modified on other grounds, 157 N. Y. 616.

73. Snyder v. Lindsey, 157 N. Y. 616.

74. Sullivan v. Mount Carmel Cemetery Assn., 244 N. Y. 294.

75. Salter v. Ham, 31 N. Y. 321; Van Gelder v. VanGelder, 77 N. Y.

Were the rule otherwise, the jurisdiction of equity would be without limit. The existence of a debt does not create a trust or confidential relation of the nature which is required to sustain an action of accounting.⁷⁶ The remedy in an action at law is deemed sufficient for the protection of the creditor's rights.⁷⁷ A debtor, who, by mistake, has overpaid his creditor, cannot require the creditor to account in equity; the remedy, if any, is an action at law for the amount of the overpayment.⁷⁸

The assignee of a claim, payment of which is refused by the debtor on the ground that it had been paid in his transactions with the assignors, to which transactions the assignee is a stranger, cannot maintain an action joining the debtor and the assignors as defendants, and seeking an accounting to ascertain the rights and liabilities of the parties and to have judgment against the one who may be found liable. His remedy must be either against the original debtor upon the claim assigned, or against the assignors for a breach of warranty.⁷⁹

2. Creditor holding property of debtor.

If, as security for a debt, a creditor has come into possession of property of the debtor and has received the income or proceeds thereof, the circumstances may permit an action in equity by the debtor to require the creditor to account for such property.⁸⁰ Thus, if the creditor has received as security for an obligation accounts or other choses in action, he may be required to account to the debtor for the

446; *Low v. Swartwout*, 171 App. Div. 725, 157 N. Y. Supp. 1067; *Ehrlich v. Mills*, 215 App. Div. 116, 213 N. Y. Supp. 395; *Lemmos Broad Silk Works v. Spiegelberg*, 127 Misc. 755, 217 N. Y. Supp. 595.

76. *Clements v. W. S. Cooper Co.*, 136 N. Y. Supp. 93.

77. *Clements v. W. S. Cooper Co.*, 136 N. Y. Supp. 93.

78. *Wisner v. Consolidated Fruit Jar Co.*, 25 App. Div. 362, 49 N. Y. Supp. 500.

79. *Camblos v. Butterfield*, 15 Abb. Pr. N. S. 197.

80. *Klein v. Mechanics' & T. Bank*,

69 Misc. 504, 125 N. Y. Supp. 1100, reversed on other grounds, 145 App. Div. 615, 130 N. Y. Supp. 436; *Unangst v. Roe*, 107 Misc. 516, 177 N. Y. Supp. 706; *Weil v. Levy*, 80 Hun 382, 61 St. Rep. 841, 30 N. Y. Supp. 127; *Shaw v. Leavitt*, 3 Sandf. Ch. 163; *Durant v. Einstein*, 28 Super. Ct. (5 Rob.) 423, 35 How. Pr. 223. See also, *Whitson v. Peekskill Nat. Bank*, 120 Misc. 39, 197 N. Y. Supp. 528; *Lewis v. Varnum*, 12 Abb. Pr. 305. Compare, *Lemmos Broad Silk Works v. Spiegelberg*, 127 Misc. 755, 217 N. Y. Supp. 595.

proceeds thereof.⁸¹ A chattel mortgagor may, if his equity of redemption has not been foreclosed, maintain an action for redemption and have an accounting of the mortgagee as to the chattels taken by the latter.⁸² If an insurance policy is assigned as security for a debt, the assignor may be permitted to maintain a suit for redemption and accounting.⁸³ A mortgagor of real estate may maintain an action against the mortgagee for an accounting, where the mortgagee has taken possession of the mortgaged premises.⁸⁴ And this is true although the mortgagee wrongfully acquired possession.⁸⁵ Or a mortgagee in possession may seek an accounting and a sale of the property for the satisfaction of the balance unpaid.⁸⁶ An attorney holding property of his client as security for his services and expenses may maintain an action in equity for the settlement of the accounts and the determination of his lien.⁸⁷

K. Master and servant.

An action in equity is not the appropriate remedy to compel an employer to pay to an employee moneys due to the latter.⁸⁸ This is true, although the sum due to the em-

81. *Liebling v. Cohn*, 179 App. Div. 766, 167 N. Y. Supp. 249.

Usurious debt.—The fact that the debtor alleges that the debt was usurious, in addition to the allegations entitling him to an accounting, does not make more than one cause of action, as the allegations as to usury bear only on the question as to the amount the debtor is entitled to recover. *Liebling v. Cohn*, 179 App. Div. 766, 167 N. Y. Supp. 249.

82. *Casserly v. Witherbee*, 119 N. Y. 522; *Reich v. Cochran*, 84 Misc. 247, 145 N. Y. Supp. 1025, affirmed, 213 N. Y. 416. See also, *Nevius v. Nevius*, 117 App. Div. 236, 101 N. Y. Supp. 1091.

83. *Bohleber v. Wældin*, 69 Hun 79, 23 N. Y. Supp. 391.

84. *Reich v. Cochran*, 213 N. Y. 416. And see, the Chapter on Redemption.

85. *Reich v. Cochran*, 213 N. Y. 416.

86. *Gordon v. Krellman*, 207 App. Div. 773, 202 N. Y. Supp. 632.

87. *VanDoren v. Mackenzie*, 190 App. Div. 847, 180 N. Y. Supp. 778, affirmed, 232 N. Y. 587.

88. *Smith v. Vodine*, 74 N. Y. 30; *Hart v. Wilder*, 3 App. Div. 356, 73 State Rep. 655, 38 N. Y. Supp. 288; *Everett v. DeFontaine*, 78 App. Div. 219, 79 N. Y. Supp. 692; *Hathaway v. Clendening Co.*, 135 App. Div. 407, 119 N. Y. Supp. 984; *Oppenheimer v. VanRaalte*, 151 App. Div. 601, 136 N. Y. Supp. 197; *Freeman v. Miller*, 157 App. Div. 715, 142 N. Y. Supp. 797; *Hutchinson v. Birdsong*, 211 App. Div. 316, 207 N. Y. Supp. 273; *Summa v. Masterson*, 215 App. Div. 159, 213 N. Y. Supp. 177; *Skilton v. Payne*, 18 Misc. 332, 42 N. Y. Supp. 111; *Lafond v. Lassere*, 26 Misc. 77, 56 N. Y. Supp. 459; *Johnston v. Berlin*, 35 Misc. 146, 71 N. Y. Supp. 454; *Linder v. Starin*, 60 Misc. 431, 113 N. Y. Supp. 652; *Heck v. Voelkle*, 95 Misc. 692, 160 N. Y. Supp. 903.

ployee is computed on a percentage of the profits of the business in which he is employed.⁸⁹ A salesman working on a commission basis, cannot maintain an action of accounting to recover his compensation.⁹⁰ A court of law has sole jurisdiction of an action to recover the compensation to which a servant is entitled, although the servant is without knowledge of the amount and it can be computed only by extended examination of the employer's books.⁹¹ Whatever accounting is necessary is incidental and can be had in an action at law, either before the court or before a referee.⁹² The relation between the parties in such a case is not that of partners or joint adventurers. Nor is the relation fiduciary in character. But it requires but little change in the facts to make the relation one of a confidential nature where an accounting would be proper. If an enterprise turns over to a person the management of a department of its business for a considerable period, to be managed by him as his own, the relation between the parties may be of a nature which will permit an action in equity.⁹³ Moreover, if the transaction is of considerable magnitude, and the employer has agreed to furnish statements of accounts, and the accounts are long and complicated, it has been thought that equity would take cognizance of the controversy.⁹⁴

L. Bailor and bailee.

The relation of bailor and bailee, of itself, does not justify an action in equity to require one of the parties to account.⁹⁵

89. *Smith v. Bodine*, 74 N. Y. 30; *Lee v. Washburn*, 80 App. Div. 410, 80 N. Y. Supp. 1040; *Hathaway v. Clendening Co.*, 135 App. Div. 407, 119 N. Y. Supp. 984; *Freeman v. Miller*, 157 App. Div. 715, 142 N. Y. Supp. 797; *Vincent v. Macbeth*, 211 App. Div. 110, 206 N. Y. Supp. 870; *Schwartz v. Marjolet, Inc.*, 214 App. Div. 530, 212 N. Y. Supp. 494; *Martin v. Riehl*, 27 Misc. 112, 58 N. Y. Supp. 141; *Heck v. Voelkle*, 95 Misc. 692, 160 N. Y. Supp. 903.

90. *Hutchinson v. Birdsong*, 211 App. Div. 316, 207 N. Y. Supp. 273; *Skilton v. Payne*, 18 Misc. 332, 42 N. Y. Supp. 111; *Lafond v. Lassere*, 26 Misc. 77,

56 N. Y. Supp. 459; *Johnston v. Berlin*, 35 Misc. 146, 71 N. Y. Supp. 454.

91. *Lee v. Washburn*, 80 App. Div. 410, 80 N. Y. Supp. 1040; *Oppenheimer v. VanRaalte*, 151 App. Div. 601, 136 N. Y. Supp. 197.

92. *Hathaway v. Clendening Co.*, 135 App. Div. 407, 119 N. Y. Supp. 984; *Lindner v. Starin*, 60 Misc. 431, 113 N. Y. Supp. 652.

93. *Lord v. Speilmann*, 29 App. Div. 292, 51 N. Y. Supp. 534.

94. *Parker v. Pullman*, 36 App. Div. 208, 56 N. Y. Supp. 734.

95. *Logan v. Fidelity-Phenix F. Ins. Co.*, 181 App. Div. 624, 168 N. Y. Supp. 883; *N. Y. Life Ins. Co. v. Hamilton*,

The remedy, if any, of a bailor can normally be found in an action at law to recover the property which is the subject of the bailment, or in an action for damages in case of a misappropriation of the property.⁹⁶ Yet the fact that the relation can be construed as bailor and bailee does not preclude an accounting, if the other circumstances indicate that the property has been received in a fiduciary capacity. Hence, one with whom property has been delivered as security for a loan, may under some circumstances be required to account for the property or its proceeds.⁹⁷ A common carrier who insures goods left in his charge, for the benefit of the owners as well as of itself, may, if it receives the proceeds of a loss, be called upon to account to the owners.⁹⁸

M. Landlord and tenant.

As a general rule, the relation between the owner of real property and a lessee thereof is not of such a confidential or trust nature that an action of accounting can be maintained to settle their accounts. Particular circumstances, however, may change the situation. Thus, where the amount of the rent was controlled by the profits arising from the use of the premises by the tenant, the landlord has been permitted to sue in equity and to have an accounting as to the amount of such profits.⁹⁹ In such cases the relations between the parties is, in some respect, similar to that existing between joint adventurers.¹

It has been held that where a lease provides for the working of a farm on shares, the tenant may maintain an action in equity to require an accounting by the owner.² This, however, is a close question. The relation may be considered as similar to that of joint adventurers, and upon that reasoning an accounting might be justified. On the

52 Misc. 189, 102 N. Y. Supp. 771; *Lemmos Broad Silk Works v. Spiegelberg*, 127 Misc. 855, 217 N. Y. Supp. 595.

96. *Logan v. Fidelity-Phenix F. Ins. Co.*, 181 App. Div. 624, 168 N. Y. Supp. 883.

97. See, *supra*, II-J, Debtor and Creditor.

98. *Symmers v. Carroll*, 207 N. Y. 632.

99. *Brennan v. Gale*, 56 App. Div. 4, 67 N. Y. Supp. 382. See also, *Brennan v. Gale*, 44 App. Div. 396, 61 N. Y. Supp. 6.

1. *Brennan v. Gale*, 56 App. Div. 4, 67 N. Y. Supp. 382.

2. *Rice v. Peters*, 128 App. Div. 776, 113 N. Y. Supp. 40; *Bardwell v. Black*, 139 App. Div. 433, 178 N. Y. Supp. 642.

other hand, the tenant might be considered to occupy the position of an employee who receives for his services a share of the profits of a business. Such an employee cannot maintain an action for accounting.³ Hence, there is authority which denies the tenant the right to sue in equity.⁴

N. Vendor and purchaser.

As between a vendor and a purchaser there is usually no necessity for an equitable accounting.⁵ The fiduciary relation which is essential to such an action, is lacking.⁶ But an accounting may be had in certain equitable actions between a vendor and vendee, where such relief is incidental, as in an action of specific performance,⁷ or an action of rescission.⁸

O. Royalties.

Equity does not assume jurisdiction of every action in which an accounting is necessary. In addition to the right to an account, there must exist some trust or other fiduciary relation.⁹ Hence an action to recover royalties is an action at law, and an action in equity to account for such royalties cannot be maintained.¹⁰ Thus, where a license is granted to manufacture goods covered by a patent, an action to recover the royalty is maintainable only in a court of law.¹¹ Royalties arising out of the publication and sale of musical or literary property are in the same situation.¹² But, if the agreement between the parties provides that royalties not

3. See, supra, II-K, Master and Servant.

4. Getman v. Dorr, 28 Misc. 654, 59 N. Y. Supp. 788.

5. Frank Gilbert Paper Co. v. Prankard, 204 App. Div. 83, 198 N. Y. Supp. 25.

6. Harle v. Brennig, 131 App. Div. 742, 116 N. Y. Supp. 51.

7. Taylor v. Taylor, 43 N. Y. 578. See the Chapter on Specific Performance.

8. See the Chapter on Rescission.

9. Moore v. Coyne, 113 App. Div. 52, 98 N. Y. Supp. 892.

10. C. & C. Electric Co. v. Walker Co., 35 App. Div. 426, 54 N. Y. Supp.

810; Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. Supp. 665; Ehrlich v. Mills, 215 App. Div. 116, 213 N. Y. Supp. 395; Electric, Etc., Corp. v. American Laboratories, 225 App. Div. 37; McCullough v. Pence, 85 Hun 271, 66 St. Rep. 470, 32 N. Y. Supp. 986. See also, Genet v. Delaware & Hudson Canal Co., 10 St. Rep. 35, 12 Civ. Proc. R. 448, 27 Week. Dig. 96.

11. Henderson v. Dougherty, 95 App. Div. 346, 88 N. Y. Supp. 665; Moore v. Coyne, 113 App. Div. 52, 98 N. Y. Supp. 892.

12. Ehrlich v. Mills, 215 App. Div. 116, 213 N. Y. Supp. 395.

immediately turned over shall be held in trust, an accounting may be had.¹³

ARTICLE III.

PROCEDURE.

A. Statute of limitations; laches.

1. Statute applicable.

Where there is concurrent jurisdiction in law and in equity, equity is bound by the Statute of Limitations applicable to the action at law.¹⁴ Hence the six year statute contained in section 48 of the Civil Practice Act is sometimes applicable to an equitable action of accounting.¹⁵ In the absence of an express trust between the parties, the six year limitation may be enforced.¹⁶ The six year statute may be applied in an action between tenants in common.¹⁷ An action by a customer to compel a broker to account, may be barred by the six year statute.¹⁸

If, however, there is no remedy other than in equity, the ten year limitation prescribed in section 53 applies.¹⁹ Hence the ten year limitation is applicable to a partnership accounting.²⁰ An action to require an express trustee to account is within the ten year limitation.²¹ The right of a beneficiary to require the representatives of a deceased executor to account runs in ten years from the date of the appointment.²²

The period may be extended by the disabilities mentioned in section 60 of the Civil Practice Act, such as infancy, in-

13. *Caesar v. Ziegfeld*, 223 App. Div. 86, 226 N. Y. Supp. 510.

14. *Minion v. Warner*, 238 N. Y. 413; *Keys v. Leopold*, 241 N. Y. 189; *Dumbadze v. Lignante*, 244 N. Y. 1; *Bertine v. Varian*, 1 Edw. Ch. 343. See also, *Wheeler v. Breslin*, 47 Misc. 507, 95 N. Y. Supp. 966.

15. *Minion v. Warner*, 238 N. Y. 413; *Keys v. Leopold*, 241 N. Y. 189.

16. *Dumbadze v. Lignante*, 244 N. Y. 1.

17. *Minion v. Warner*, 238 N. Y. 413.

18. *Keys v. Leopold*, 241 N. Y. 189.

19. *Appleby v. Brown*, 24 N. Y. 143; *Beugger v. Ashley*, 161 App. Div. 576, 146 N. Y. Supp. 910; *McKenzie v.*

Wappler Elec. Co., 215 App. Div. 336, 213 N. Y. Supp. 389; *Still v. Holbrook*, 23 Hun 517.

20. *Appleby v. Brown*, 24 N. Y. 143; *Hutchinson v. Sperry*, 158 App. Div. 704, 143 N. Y. Supp. 876, affirmed without opinion, 214 N. Y. 616; *Beugger v. Ashley*, 161 App. Div. 576, 146 N. Y. Supp. 910; *Atwater v. Fowler*, 1 Edw. 417.

21. *Finnegan v. McGuffog*, 203 N. Y. 342; *Gambold v. MacLean*, 126 Misc. 820, 215 N. Y. Supp. 607; *Still v. Holbrook*, 23 Hun 517.

22. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410, affirmed without opinion, 195 N. Y. 509.

sanity, or imprisonment;²³ or by an acknowledgment or new promise in writing under section 59.²⁴ The time may also be extended by non-residence or death of the person liable to account.²⁵

2. When action accrues.

A cause of action for an accounting as between partners or joint adventurers usually commences to run at the time of the dissolution of the firm;²⁶ but, as a general rule, not previously.²⁷ This rule as to partners is statutory, if the partnership agreement does not provide to the contrary.²⁸

During the duration of an express trust, a cause of action for an accounting by the trustee is of a continuing nature, and the statute does not commence to run.²⁹ But, upon the termination of the trust, the action accrues.³⁰ Or, if the trustee commits some act in open and notorious hostility to the trust, the cause of action is deemed to accrue.³¹ The statute does not commence to run in favor of a trustee or executor against one otherwise entitled to an accounting until the representative has by some act openly repudiated his trust and liability.³² The making of a will by the trustee

23. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410, affirmed without opinion, 195 N. Y. 509.

24. *Doncourt v. Dentence*, 55 Misc. 594, 103 N. Y. Supp. 906, affirmed on opinion below, 131 App. Div. 905, 115 N. Y. Supp. 1118.

Letters written by the defendant acknowledging his continued obligation to account, may constitute a sufficient acknowledgment under section 59. *Doncourt v. Dentence*, 55 Misc. 594, 103 N. Y. Supp. 906, affirmed on opinion below, 131 App. Div. 905, 115 N. Y. Supp. 1118.

25. Civil Practice Act, §§ 21, 55; *Appleby v. Brown*, 24 N. Y. 143.

26. *Fellows v. Johnson*, 91 App. Div. 611, 86 N. Y. Supp. 436; *Hutchinson v. Sperry*, 158 App. Div. 704, 143 N. Y. Supp. 876, affirmed without opinion, 214 N. Y. 616; *Rice v. Maddock*, 16 Daly 156, 30 State Rep. 350, 9 N. Y. Supp. 524.

27. *Doncourt v. Dentence*, 55 Misc.

594, 103 N. Y. Supp. 906, affirmed on opinion below, 131 App. Div. 905, 115 N. Y. Supp. 1118.

28. Partnership Law, § 74.

29. *Matter of Anderson*, 122 App. Div. 453, 106 N. Y. Supp. 818; *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339.

30. *Finnegan v. McGuffog*, 203 N. Y. 342.

On the death of the trustee, the right of beneficiary to compel his representatives to account accrues from the date of their appointment. *Bushe v. Wright*, 118 App. Div. 320, 103 N. Y. Supp. 410, affirmed without opinion, 195 N. Y. 509.

31. *Finnegan v. McGuffog*, 203 N. Y. 342.

32. *Anderson v. Fry*, 116 App. Div. 740, 102 N. Y. Supp. 112; *Matter v. Anderson*, 122 App. Div. 453, 106 N. Y. Supp. 818; *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339.

attempting to dispose of the trust property as his individual property is not a complete act of hostility to the trust. Nor is the deposit of the trust funds in a bank in his own name such an act.³³

If there exists between the parties mutual, open and current accounts, the statute does not commence to run until the time of the last item proved in the account on either side.³⁴ In some cases a demand may be necessary before the statute commences to run; and, when such is the situation, section 15 of the Civil Practice Act may control.³⁵ Subdivision 1 of this section is applicable to many classes of accounting.³⁶ In cases where fraud is charged, the action may be governed by subdivision 5 of section 48, providing that the cause of action does not accrue until the discovery of the fraud.³⁷

3. Laches.

Before the enactment of a statute of limitations applying to equitable causes, the Court of Chancery would sometimes refuse to hear a cause on account of its "staleness."³⁸ After the extension of statutory limitations to equitable causes, it was sometimes thought that equity would not dismiss the action on the ground of laches unless the delay in prosecuting the suit exceeded the statutory limitation.³⁹ There are, however, cases where the court has declared its power to dismiss a complaint for "staleness,"⁴⁰ but this discretionary power has seldom been exercised in actions of accounting. The action will not be dismissed for laches, unless in the interim there has been such a change in the situation as to render it inequitable to grant the relief.⁴¹

33. *Devoe v. Lutz*, 133 App. Div. 356, 117 N. Y. Supp. 339.

34. Civil Practice Act, § 56. *Minion v. Warner*, 238 N. Y. 418.

35. *Dumbadze v. Lignante*, 244 N. Y. 1; *Wheeler v. Breslin*, 47 Misc. 507, 95 N. Y. Supp. 966.

36. *Cornwell v. Clement*, 10 App. Div. 446, 42 N. Y. Supp. 295.

37. *Dumbadze v. Lignante*, 244 N. Y. 1; *Anderson v. Fry*, 116 App. Div. 740, 102 N. Y. Supp. 112; *Clark v. Gilmore*, 149 App. Div. 445, 133 N. Y. Supp. 1047.

38. *Bertine v. Varian*, 1 Edw. Ch.

343; *Ray v. Bogart*, 2 Johns. Cas. 432; *Ellison v. Moffatt*, 1 Johns. Ch. 46; *Phillips v. Prevost*, 4 Johns. Ch. 205; *Mooers v. White*, 6 Johns. Ch. 360.

39. *Derby v. Yale*, 13 Hun 273.

40. *Zebley v. Farmers' Loan & Trust Co.*, 139 N. Y. 461; *Hutchinson v. Sperry*, 158 App. Div. 704, 143 N. Y. Supp. 876, affirmed without opinion, 214 N. Y. 616; *Wheeler v. Breslin*, 47 Misc. 507, 95 N. Y. Supp. 966. See also, *Peralta v. Escobar*, 207 App. Div. 611, 202 N. Y. Supp. 714.

41. *Seligson v. Weiss*, 222 App. Div. 634, 227 N. Y. Supp. 338.

B. Pleadings.**1. Complaint.**

The complaint must contain appropriate allegations to show that there exists between the parties a fiduciary or such other relation as justifies an equitable action of accounting.⁴² It must appear from the complaint, not only that an accounting is necessary to determine the rights of the parties, but also that the defendant has been intrusted with property in which the plaintiff has an interest.⁴³ A complaint in an action between partners should allege the terms of the partnership or the interests of the parties therein.⁴⁴ An allegation that certain persons entered into a co-partnership, and that among other terms of the partnership the plaintiff and a defendant should each have a quarter interest therein, is not a statement of a legal conclusion, but can fairly be construed as a statement of the formation of a partnership in which the plaintiff and others were interested as alleged.⁴⁵ If it is sought to charge one as an implied trustee, as one receiving money through fraud or conspiracy, allegations of fact showing the fraud or conspiracy should be alleged, but matters of evidence should not be averred.⁴⁶ When a demand for an accounting is a prerequisite to the action, the complaint should allege the making of a demand.⁴⁷ The complaint need not state that there is a balance due to the plaintiff.⁴⁸

42. *Williams v. Slote*, 70 N. Y. 601; *Rivelson v. Silverstein*, 65 App. Div. 614, 72 N. Y. Supp. 594; *Harle v. Brenning*, 131 App. Div. 742, 116 N. Y. Supp. 51; *Boiardi v. Marden, O. & H. Co.*, 194 App. Div. 307, 185 N. Y. Supp. 331, appeal dismissed, 230 N. Y. 607.

Surplusage.—When it appears from the action that defendant is rightfully in possession of money or property, either in a fiduciary capacity or otherwise, in accord with the provisions of an agreement, contract, or arrangement made with plaintiff, and an action is brought for an accounting, additional allegations charging conversion or wrongful appropriation to his own use are mere surplusage and may be disregarded. *Silver King Min. Co. v. Knowlton*, 26 Week. Dig. 241.

43. *Kosovits v. New York First Hungarian, Etc., Soc.*, 130 N. Y. Supp. 72.

44. *Eisner v. Eisner*, 5 App. Div. 117, 38 N. Y. Supp. 671.

45. *Parry v. Parry*, 92 Misc. 490, 155 N. Y. Supp. 1072.

46. *Bankers' Surety Co. v. Rothschild*, 111 App. Div. 130, 96 N. Y. Supp. 1113.

47. *N. Y. Life Ins. Co. v. Hamilton*, 52 Misc. 189, 102 N. Y. Supp. 771; *Burke v. Rector Churchwarden, etc.*, 64 Misc. 380, 119 N. Y. Supp. 362.

48. *Petrakion v. Arbeely*, 23 Civ. Proc. 183, 26 N. Y. Supp. 731; *Reading v. Haggin*, 58 Hun 450, 35 St. Rep. 585, 12 N. Y. Supp. 368. And see, *supra*, I-F, necessity of balance due plaintiff.

A complaint stating all of the facts necessary for an equitable action of accounting may be sustained as such, although the plaintiff fails to demand such relief in his complaint.⁴⁹

2. Joinder of causes of action.

A cause of action for accounting cannot ordinarily be joined with another cause of action in the same complaint unless they arise out of the same transaction, or transactions connected with the same subject of action, within the meaning of subdivision 9 of section 258 of the Civil Practice Act.⁵⁰ Possibly subdivisions 1 and 8 will permit the joinder in a few other cases. In an equitable action it is not necessary that different causes of actions in the same complaint should affect all of the defendants to the same extent or in the same way.⁵¹ A complaint does not set forth more than one cause of action merely because it seeks to charge one both in his representative and in his individual capacity.⁵²

3. Variance.

The judgment rendered by any court must be *secundum allegata et probata*.⁵³ Where the complaint bases the plaintiff's right to an accounting solely upon the alleged exist-

49. *Baum v. Lamborn*, 203 App. Div. 86, 196 N. Y. Supp. 478; *Josias v. Sugar Products Co.*, 169 N. Y. Supp. 887, affirmed without opinion, 187 App. Div. 905, 174 N. Y. Supp. 908.

50. Trinity Church.—The joinder was not permitted of a cause of action against the corporation of Trinity Church to restrain the closing a St. John's Chapel with one against the vestrymen of Trinity Church, as individual defendants, for an account of the property of the corporation. *Burke v. Rector, Churchwarden, etc.*, 64 Misc. 380, 119 N. Y. Supp. 362.

Conversion.—Causes of action for the conversion and wrongful detention of personal property, and for an accounting between the parties, cannot properly be united in the same complaint. *McDonald v. Kountze*, 58 How. Pr. 152; *Thompson v. St. Nicholas Bank*, 61 How. Pr. 163.

51. Rogers v. Wheeler, 89 App. Div. 435, 85 N. Y. Supp. 931.

52. Donnelly v. Lambert, 62 App. Div. 189, 70 N. Y. Supp. 963; *Rogers v. Wheeler*, 89 App. Div. 435, 85 N. Y. Supp. 981; *Day v. Stone*, 15 Abb. Pr. N. S. 137.

53. Arnold v. Angell, 62 N. Y. 508; *Somers v. Harris*, 161 App. Div. 230, 146 N. Y. Supp. 572, modified 163 App. Div. 929, affirmed without opinion, 220 N. Y. 743; *Weeks v. Hoyt*, 5 Hun 347; *Manning v. Manning*, 89 Hun 471, 35 N. Y. Supp. 333.

Good will of partnership.—A complaint asking for the dissolution of a partnership and for an accounting, alleged the organization of the partnership, a subsequent termination thereof by agreement, and that the "assets of the partnership exclusive of such sums as may be found due it from the defendant" were of a certain value "and

ence of a certain partnership, if the plaintiff fails to establish the partnership, he is not entitled to insist upon an accounting upon any other theory, and judgment may properly be rendered against him.⁵⁴ Where a defendant is brought into court under allegations of a general partnership existing between him and the plaintiff, a recovery by the plaintiff should not be permitted upon proof that the relationship existing between the parties was that of a joint venture and not a partnership.⁵⁵ By appropriate allegations, however, the complaint may be drawn so as to cover a case either of partnership or joint adventure, whichever the evidence may indicate.⁵⁶ If the complaint alleges an agency, recovery may be denied where the evidence shows a partnership or joint adventure.⁵⁷ But in an action against an agent, the fact that the defendant is described as a "selling agent" is not fatal, the fact of agency appearing.⁵⁸ An amendment of the complaint may in some cases be permitted.⁵⁹ Thus, if the defendant has misled the plaintiff as to the nature of the transactions between them, he is in no position to object to an amendment which correctly alleges the facts.⁶⁰

consisted of securities, cash in bank, bills receivable and office furniture." The answer admitted the organization and termination of the partnership by agreement, and joined in asking for an accounting. Neither the complaint nor answer mentioned the good will of the firm as an asset. *Held*, on all the evidence, that a judgment in favor of the plaintiff should be reversed in so far as it directs the defendant to pay to the receiver a certain sum as the value of the good will of the partnership. *Somers v. Harris*, 161 App. Div. 230, 146 N. Y. Supp. 572, modified 163 App. Div. 929, affirmed without opinion, 220 N. Y. 743.

54. *Salter v. Ham*, 31 N. Y. 321; *Kirkwood v. Smith*, 82 App. Div. 411, 81 N. Y. Supp. 891, affirmed without opinion, 178 N. Y. 582.

55. *Boice & Jones*, 106 App. Div. 547, 94 N. Y. Supp. 896.

56. *Boice v. Jones*, 106 App. Div. 547, 94 N. Y. Supp. 896.

57. *Hughes v. Smither*, 23 App. Div. 590, 49 N. Y. Supp. 115, affirmed on opinion below, 163 N. Y. 553.

58. *Campbell v. Sloane*, 51 St. Rep. 328, 22 N. Y. Supp. 81.

59. **Amendment of complaint.**—In a suit by a corporation for an accounting by a defendant who is alleged to have mismanaged its properties the plaintiff should be allowed to amend its complaint at trial so as to extend the period covered by the accounting where evidence covering the extended period has already been taken and where the defendant was not taken by surprise or otherwise prejudiced and he makes no affidavit in opposition to the motion, but merely relies on deficiencies in the plaintiff's papers. *Topia Mining Co. v. Warfield*, 148 App. Div. 139, 132 N. Y. Supp. 1051.

60. *Crosby v. Watts*, 41 Super. Ct. (9 J. & S.) 203.

4. Sustaining complaint as an action at law.

The sufficiency of a complaint framed in equity and asking solely equitable relief, is ordinarily tested by determining whether it states an equitable cause of action.⁶¹ But, if an answer to such a complaint is interposed and the parties proceed to trial on the issues, the complaint will not ordinarily be dismissed because it appears that the plaintiff is not entitled to equitable relief, provided the complaint shows a cause of action at law.⁶² In such a case the issues may be sent to a jury for trial.⁶³ This, however, cannot be done unless the complaint states facts sufficient to support an action at law.⁶⁴ The power to continue the action for legal relief is discretionary, and the Court of Appeals will not review a dismissal of the action when the plaintiff fails to establish his equitable claims.⁶⁵ A money judgment should not be granted upon a theory entirely at variance with the facts averred in the complaint.⁶⁶ If the plaintiff is not entitled to the equitable relief sought by his complaint and he does not ask that the action be retained for legal relief, the complaint must be dismissed without prejudice to an action at law.⁶⁷ The court cannot determine the controversy as an action at law without the aid of a jury, for such practice would involve an infringement of constitutional rights.⁶⁸

If the action is wrongfully brought at law, it will be dismissed, although under the same facts the plaintiff might be entitled to relief in equity.⁶⁹

61. *Boiardi v. Marden, O. & H. Corp.*, 194 App. Div. 307, 185 N. Y. Supp. 331, appeal dismissed, 230 N. Y. 607; *Kraemer v. World Wide Trading Co.*, 195 App. Div. 305, 187 N. Y. Supp. 16; *Kosovits v. New York First Hungarian St. Stephen's Roman Catholic, Etc., Soc.*, 130 N. Y. Supp. 72. Compare, *Middleton v. Ames*, 37 App. Div. 510, 57 N. Y. Supp. 443.

62. *Kraemer v. World Wide Trading Co.*, 195 App. Div. 305, 187 N. Y. Supp. 16.

63. *Kraemer v. World Wide Trading Co.*, 195 App. Div. 305, 187 N. Y. Supp. 16.

64. *Arnold v. Angell*, 62 N. Y. 508;

Ehrlich v. Mills, 215 App. Div. 116, 213 N. Y. Supp. 395.

65. *Sherburne v. Taft*, 142 N. Y. 619.

66. *Manning v. Manning*, 89 Hun 471, 35 N. Y. Supp. 333.

67. *Freeman v. Miller*, 157 App. Div. 715, 142 N. Y. Supp. 797; *Skilton v. Payne*, 18 Misc. 332, 42 N. Y. Supp. 111; *Johnston v. Berlin*, 35 Misc. 146, 71 N. Y. Supp. 454.

68. *Lewis v. Varnum*, 12 Abb. Pr. 305.

69. *Goldsticker v. Goldsticker*, 106 Misc. 182, 174 N. Y. Supp. 257; *Short v. Barry*, 58 Barb. 177.

5. Counterclaim.

Upon the accounting, the items in favor of both parties are to be considered. It is unnecessary and improper for the defendant to assert a counterclaim for any items due him which relate to the transactions covered by the accounting.⁷⁰ The defendant, if the accounting shows a balance in his favor, may have affirmative relief, although his answer does not demand such relief.⁷¹ A defendant may set up a counterclaim asking for an accounting, where he is sued in an action at law for an item which might properly come within the scope of the accounting.⁷²

There is little opportunity for counterclaims to a complaint asking for an accounting between partners. Any sums which a defendant partner may be entitled to claim by reason of the partnership affairs may be proved without specific allegations in the form of a counterclaim.⁷³ But an action for accounting between partners may be an action founded on a contract within the meaning of subdivision 2 of section 266 of the Civil Practice Act relating to counterclaims, so that any cause of action on contract existing at the time of the commencement of the action may be pleaded as a counterclaim.⁷⁴ Thus counterclaims alleging a breach of the partnership agreement by the plaintiff and claiming damages therefor, have been allowed in some cases.⁷⁵ Likewise, it has been thought proper to set up as a counterclaim that the partnership agreement contained an option permitting the defendant to purchase the partnership business, and that the defendant had exercised such option.⁷⁶ And in an action by one partner for an accounting, it has been held that the other partners may set up as a counterclaim a cause

70. *Smith v. Snowbar*, 198 App. Div. 820, 191 N. Y. Supp. 248; *United States Trust Co. v. Greiner*, 124 Misc. 458, 209 N. Y. Supp. 105, affirmed, 215 App. Div. 659, 212 N. Y. Supp. 931; *Charley v. Watson*, 23 Week. Dig. 189.

71. *Consolidated Fruit Jar Co. v. Wisner*, 110 App. Div. 99, 97 N. Y. Supp. 52, affirmed without opinion, 188 N. Y. 624; *United States Trust Co. v. Greiner*, 124 Misc. 458, 209 N. Y. Supp. 105, affirmed, 215 App. Div. 659, 212 N. Y. Supp. 931.

72. *Jordan v. Underhill*, 91 App. Div. 124, 86 N. Y. Supp. 620.

73. *Smith v. Snowbar*, 198 App. Div. 820, 191 N. Y. Supp. 248; *Reeves v. Bushby*, 25 Misc. 226, 55 N. Y. Supp. 70.

74. *Petrakion v. Arbeely*, 23 Civ. Proc. 183, 26 N. Y. Supp. 731.

75. *Reeves v. Bushby*, 25 Misc. 226, 55 N. Y. Supp. 70.

76. *Corr. v. Hoffman*, 219 App. Div. 278, 219 N. Y. Supp. 656.

of action for fraud based on fraudulent representations of the plaintiff inducing them to buy into the business and become partners.⁷⁷

In an action at law on a note, the defendant cannot set up a counterclaim based on a balance due to him by reason of unsettled partnership accounts.⁷⁸

In an action by one of several trustees against the others, in which he alleges a breach of trust, and asks their removal and the appointment of new trustees in place of them, they may set up as a counterclaim that the plaintiff has been guilty of breaches of trust, by violations of the same trust instrument, and demand that he account, and may also demand his removal.⁷⁹

6. Bill of particulars.

In brief, the practice which prevails in an action of accounting is, first to try any issue as to the right to an accounting; and, if the right to an accounting is established, an interlocutory judgment is rendered directing an accounting and appointing a referee to take the accounts. The various items in the accounts of the several parties are not in issue until the hearing before the referee. Hence it is held that before interlocutory judgment neither party is entitled to a bill of particulars as to the items of his opponent's account.⁸⁰ On the other hand, the court may properly direct a bill of particulars of the facts which entitle the plaintiff to an accounting.⁸¹ Thus, if an accounting

77. *More v. Rand*, 60 N. Y. 208.

78. *Hammond v. Terry*, 3 Lans. 186.

79. *Vose v. Galpen*, 18 Abb. Pr. 96.

80. *Baum v. Lamborn*, 203 App. Div. 86, 196 N. Y. Supp. 478; *Josias v. Sugar Products Co.*, 169 N. Y. Supp. 887, affirmed without opinion, 187 App. Div. 905, 174 N. Y. Supp. 908. Compare, *Miller v. Kent*, 60 How. Pr. 388.

81. *Richards v. Miller*, 167 App. Div. 443, 153 N. Y. Supp. 388.

Matters known to defendant.—Where the complaint in a suit for an accounting alleges that the plaintiff, after entering into numerous contracts with property owners to represent them in condemnation proceedings, made an

agreement with the defendant to do certain legal work and collect for and pay over to the plaintiff the consideration provided by the contracts and the expenses advanced by it thereunder; that the defendant, in violation of said agreement collected large sums of money due the plaintiff from the owners out of the awards made to them, and has failed and refused to turn over such moneys, and the answer denies the allegations as to refusal to pay over amounts collected, but admits the agreement, and alleges that the contracts made by the plaintiff with the owners were *ultra vires*, the defendant is not entitled to a bill of

is sought between alleged joint adventurers, and the right to the accounting is denied, the defendant may be entitled to a bill of particulars stating whether the joint venture agreement was oral or written, and whether it was terminated orally or by written agreement.⁸² In an exceptional case a bill of particulars may be ordered before the joining of issue, as where particulars seem necessary in order to enable the defendant to plead.⁸³ Thus, where a complaint seeks to compel executors to account for an alleged trust fund held by their testator, and merely alleges the existence of the trust in general terms, the defendant is entitled to a bill of particulars stating the date of the trust in order that he may know whether the Statute of Limitations has run in whole or in part, and stating whether the trust agreement was wholly in writing or partly in parol and the terms thereof, and as to whether there has been a demand for an accounting or for the return of the stock and when, and when the property was delivered to the decedent by the plaintiff.⁸⁴

7. Form of complaint in accounting between co-tenants.⁸⁵

SUPREME COURT—KINGS COUNTY.

EDNA W. MINION AND FROST,	RALPH A. Plaintiffs,
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vs.

CLARA F. WARNER, Defendant.

Edna W. Minion and Ralph A. Frost, plaintiffs by Walter Jeffreys Carlin, their attorney, for complaint respectfully show to the Court:

FIRST: That on or about the 14th day of April, 1910, the will of John S. Frost, deceased, a copy of which is hereto annexed marked

particulars specifying the names of the property owners from whom he has collected money belonging to the plaintiff, and at what times he failed to make reports, as the accounting is sought for the purpose of acquiring information which is known to the defendant, and necessarily unknown to the plaintiff. United States Title Guaranty Co. v. Brown, 160 App. Div. 591, 145 N. Y. Supp. 1014.

82. Josias v. Sugar Products Co., 169 N. Y. Supp. 887, affirmed without opinion, 187 App. Div. 905, 174 N. Y. Supp. 908.

83. Bracken v. Toland, 153 App. Div. 57, 137 N. Y. Supp. 1043.

84. Bracken v. Toland, 153 App. Div. 57, 137 N. Y. Supp. 1043.

85. This form is adapted from that used in Minion v. Warner, 238 N. Y. 413.

"A" and made part of this amended complaint, was duly admitted to probate in the Kings County Surrogate's Court and letters testamentary duly issued thereon to defendant.

SECOND: That plaintiffs and defendant are named as legatees and devisees in the said last will and testament of John S. Frost, plaintiff Edna W. Minion having since married and being named therein as Edna W. Frost.

THIRD: That since the death of said John S. Frost, defendant has collected all of the rents and profits of the real property of decedent, all situated in the Borough of Brooklyn, County of Kings, as follows:

178 Halsey Street, to October 1st, 1912;

176 Halsey Street, to April 1, 1913;

975 Atlantic Avenue, to March 14, 1916;

100 Lefferts Place, to March 14, 1916,

and that although plaintiffs have duly demanded an account of the same from defendant, defendant has refused and still refuses to so account, although plaintiffs, as legatees and devisees under the last will and testament of John S. Frost, are entitled to their proportionate share of the said rentals so collected.

FOURTH: That plaintiffs are without knowledge of the amount of said rents and profits, the amount due them therefrom and cannot obtain such knowledge nor ascertain the said amounts, and, therefore, are without adequate remedy at law.

Wherefore, plaintiffs demand judgment as follows:

1. That an account be had of the above said rents and profits, and of all dealings with and transactions concerning said real property.

2. That defendant be adjudged to pay to plaintiffs whatever sums shall appear upon said account to be due them, said plaintiffs being ready and willing and hereby offering to pay defendant whatever sum, if any, shall appear upon said account to be due to her therefrom.

3. That plaintiffs have such other and further relief as may be just, together with the costs of this action.

8. Form of complaint as between partners.⁸⁶

N. Y. SUPREME COURT—CITY AND COUNTY OF NEW YORK.

FRANK W. SANGER, Plaintiff,

vs.

THOMAS HENRY FRENCH, Defendant.

The plaintiff complains of the defendant above-named and alleges:

I. That the plaintiff and defendant are residents and citizens of the State of New York.

86. This form is adapted from that used in *Sanger v. French*, 157 N. Y.

That prior to the month of February, 1887, the plaintiff was engaged in the purchase of dramas and plays, and in the subletting of same to theatrical managers upon royalties to be paid to the proprietors thereof, and as a theatrical manager whose specialty was the purchase and production and exploiting of plays and dramas throughout the United States and Canada, for his own benefit as manager and proprietor. That the defendant at the said time and for a long time prior thereto was associated with his father in business under the firm name and style of "S. French & Son," in the City of New York, and in London, England, in the purchase of plays and dramas and in the leasing or subletting of the same to theatrical managers throughout the United States and Canada, subject to the payment of royalties to the authors and proprietors thereof, and for compensation, usually a percentage, upon the royalties received, but the defendant was not, either in his individual capacity, nor as associated with S. French & Son, a theatrical manager, or engaged in the production of plays and dramas upon the theatrical stage for his own benefit.

II. That on or about the first day of February, 1887, one James A. Bailey (with others) was engaged in the enterprise of building a theatre in the City of New York at the corner of Broadway and Forty-first street, to be called "The Broadway Theatre." That on or about the day last mentioned the said Bailey proposed to this plaintiff and offered to him a contract to become the manager of said theatre on the completion of the same, when it should be opened for the business of dramatic and theatrical representations, and agreed to give him as compensation for his services as manager, one-third the profits of said business. The plaintiff informed defendant of said offer, and, further, that plaintiff was about to accept the same. The defendant thereupon desired plaintiff not to conclude the said proposed agreement and contract with Bailey, but desired plaintiff to unite with him (defendant) in an offer to, and a proposed contract with, said Bailey, whereby plaintiff and defendant were to contribute one-half—to wit, one-fourth each—of the capital required for the erection and completion of said theatre, and thereafter, when said theatre was opened and ready for business, to jointly produce at said theatre at their joint risk and expense, and for their joint benefit, such plays as might be purchased either by plaintiff or the defendant, jointly or separately, in their own name or in the name of "S. French & Son," and might thereafter produce and exploit as managers, either at said theatre or at any other theatre in New York, or any of the cities and towns throughout the United States and Canada.

III. That said contract and agreement was thereafter entered into and concluded by and between this plaintiff and the defendant French and the successor of said Bailey with others, and the plaintiff and the defendant each contributed one-fourth of the capital necessary to complete and equip the said theatre—to wit, about \$70,000.

That the said theatre was completed and equipped and ready for theatrical representation on or about 3d day of March, 1888, and

since said time the business of a theatre and the representation of plays and dramas has been and is now carried on regularly at said theatre throughout the seasons.

IV. That thereupon plaintiff and defendant, pursuant to the arrangement made as aforesaid, and in consideration of the premises, entered into a copartnership as equal partners in the City of New York under the firm name of "French & Sanger," for carrying on the business of purchasing, producing, exploiting and managing throughout the United States and Canada of all plays or dramas that should be purchased by them, or either of them, and produced by them at any theatre as managers and proprietors, and not merely sublet or sold on royalties to other managers; and it was agreed that both should be equally and jointly interested in all plays that should be produced, whether in the name of S. French & Son, French & Sanger, or in the name of either of the partners, the parties hereto, in their individual name, and which they should produce, exploit or manage, at any theatre in the United States or Canada, and including all such plays as should be purchased, controlled or managed by them, or either of them, and be produced at the said Broadway Theatre. And said copartnership agreement has never been terminated and is now in full force and effect.

V. That since the making of said agreement of copartnership various plays have been purchased by said French & Sanger, and arranged for and agreed to be produced at said theatre and elsewhere by the plaintiff and the defendant French pursuant to said copartnership agreement in which they have shared equally in the profits thereof, and have borne the losses share and share alike.

VI. That on or about the 12th day of May, 1888, the defendant T. Henry French left this country for England for the purpose of purchasing plays for the benefit of the copartnership of French & Sanger and under the agreement as aforesaid.

VII. That in pursuance of said business, and on or about the 22d day of June, 1888, at the City of London, the said T. Henry French purchased of Frances Hodgson Burnett, the authoress thereof, a certain drama or play called "The Little Lord Fauntleroy" or "Little Lord Fauntleroy," together with a copy of the manuscript of the said drama and the sole and exclusive right to produce the same at any theatre or place in the United States of America and the Canadas, and all profit, benefit or advantage arising or to arise in respect of said production, subject to the payment to the said Frances Hodgson Burnett of certain royalties then agreed upon and set forth in the contract of purchase, to the original whereof plaintiff begs leave to refer.

VIII. That the defendant French informed this plaintiff of the fact of the purchase aforesaid and requested plaintiff to make all necessary arrangements for the production of said play at the Broadway Theatre aforesaid by French & Sanger as managers and proprietors thereof, and plaintiff accordingly, at great expense of time, labor and money, made all the arrangements necessary for the successful production of said play at said theatre, and plaintiff, acting as such copartner and in the partnership named, made contracts

still in force with various actors and actresses to appear in the leading parts in said drama, and thereafter and on or about the third day of December, 1888, the said play was produced at the Broadway Theatre, in the City of New York, by French & Sanger, pursuant to the agreement and partnership aforesaid. That the production thereof was very successful, and said play is now continuing at said theatre and will probably run for many weeks to come, and large profits have been realized therefrom, and are now being continuously realized therefrom, for the benefit of said firm of French & Sanger, over and above all expenses as aforesaid, all of which profits have been paid to and received by the defendant.

IX. That the said play was also produced pursuant to said agreement and under the provision of the aforesaid contract at the Boston Museum in Boston, in the State of Massachusetts, beginning on or about the 20th day of August, 1888, for a period of one hundred nights and upwards, and was there very successful, and large profits were realized for the said firm over and above all expenses and royalties.

X. That said play has also been successfully produced in various New England cities and towns by various dramatic companies under the said contract, and still other companies are now being made ready for the production of said drama in various states and cities throughout the United States and the Canadas and large profits may reasonably be expected to accrue therefrom.

XI. That the said T. Henry French, in violation of the aforesaid agreement and contract of copartnership, and in fraud of the rights of this plaintiff, has refused to account to or pay over to this plaintiff any portion of the profits received by him, either in the City of New York at the Broadway Theatre aforesaid, or in Boston or elsewhere, and further declares that he will not account to this plaintiff for any portion of said profits nor for any of the profits that may hereafter accrue from the production of said drama throughout the United States and the Canadas, and denies the right of this plaintiff to any of the profits resulting therefrom.

Wherefore, plaintiff demands judgment:

I. That the plaintiff and the defendant T. Henry French may be adjudged equal copartners in the ownership, production and management of the play, "The Little Lord Fauntleroy," and to be entitled to the profits arising from the production and management thereof equally, share and share alike.

II. That the defendant T. Henry French may be enjoined from receiving, except as copartner as aforesaid, the profits arising from the production of said play at the Broadway Theatre or elsewhere.

III. That a Receiver may be appointed by the Court to take and receive the profits arising from the production of said play at the Broadway Theatre pending this suit and to divide the same between said partners under the direction of this Court.

IV. That the defendant be directed and required to account to this plaintiff for all the profits heretofore received by him, whether in his own name or in the name of any other person or persons from the production of said play at said Broadway Theatre, and in the

United States or Canada wherever the same has been produced, and to pay over to the plaintiff such sums as shall be found due to him upon said accounting, to wit, one-half thereof.

V. That such other or further relief may be granted to the plaintiff as to the Court shall seem meet and just, together with his costs and disbursements of action.

9. Form of complaint in action against agent.⁸⁷

JOHN J. MARVIN,	}
<i>vs.</i>	
JAMES I. BROOKS, BENJAMIN C. MIFFLIN AND THE AMERICAN EXCHANGE NATIONAL BANK.	

The plaintiff above named, John J. Marvin, by Stickney & Shepard, his attorneys, complains of the defendants above named, and alleges:

That as he is informed and verily believes, the said defendant, the American Exchange National Bank, is a corporation duly created and organized under the laws of the United States as a National Bank, for the purpose of carrying on the business of banking at the City of New York; that as the plaintiff is informed and verily believes, prior to the 23d day of September, 1878, one Potter, who was the executor of one Ward, deceased, at the City of Chicago, in the State of Illinois, was possessed of and owned as such executor, certain securities, that is to say, 3,770 shares of the capital stock of the Silver Islet Consolidated Mining and Lands Company, and bonds of said company, amounting on their face value to the sum of \$22,750, also bonds of a certain corporation, which were convertible for the bonds of the last mentioned corporation, the Silver Islet Consolidated Mining and Lands Company, amounting to \$3,000, according to their face value, which securities the said Potter, as executor, as before said was ready and willing to sell.

That the plaintiff made an agreement with the defendants Brooks and Miffin, whereby it was agreed that a purchase should be made of the said securities, from the said Potter, for the joint interest of the plaintiff and the said two defendants, that the plaintiff should advance and furnish one half of the purchase money, necessary to be paid for said securities, and that said Brooks and Miffin should advance the other half of the funds necessary to complete the purchase of the said securities, and that the securities so purchased should be divided equally, one half to this plaintiff and the other half to said Brooks and Miffin; that it was also agreed that the said

⁸⁷. This form is adapted from that used in Marvin v. Brooks, 94 N. Y.

Brooks should take charge of the negotiations for the said purchase, and should complete the same for the benefit of the parties interested therein, as aforesaid; that thereafter the said Brooks did actually make and complete the same for the benefit of the parties interested therein, as aforesaid; that thereafter the said Brooks did actually make and complete the purchase of said securities; that plaintiff is ignorant of the precise number or quality of the securities so purchased by said Brooks, and is ignorant also of the precise amount of money which he paid therefor.

That the said Brooks advised and informed the plaintiff that he should make his certain draft upon the defendant, the American Exchange National Bank in the City of New York, for a large amount of money, about \$34,000, for the purpose of completing the purchase of said securities, and requested the plaintiff to see that said draft should be honored and duly paid; and that the said Brooks further advised the plaintiff that he should transmit with said draft to the said American Exchange National Bank, the securities aforesaid, for the purchase money of which the said draft was drawn, and which securities would be held by said bank to secure the amount of money which they should pay upon said draft; that thereafter, and on or about the first day of October, 1878, the said Brooks did draw his certain draft upon the said American Exchange National Bank, payable to the order of T. S. Darling & Co., bearing date at Detroit, the first of October, 1878, for the sum of \$37,765, which said draft expressed, there was attached thereto \$3,000 in old bonds, and \$22,750 in new bonds of the Silver Islet Mining and Lands Company, with 3,550 shares of the stock of the same company, and which said draft was, as plaintiff is informed and verily believes, drawn for the purchase money of said securities.

That the plaintiff paid or caused to be paid to the American Exchange National Bank, the entire amount of money was paid by said bank to the holder of said draft, and the said bank thereupon received the securities aforesaid, which were mentioned in the body of said draft.

That the defendant Brooks directed the said American Exchange National Bank to deliver of said securities \$13,000 in bonds and 1,850 shares of said stock to the plaintiff; that the said Brooks also further directed said bank, as plaintiff is informed and verily believes, to deliver to said Mifflin or his order \$7,500 in bonds and 750 shares of stock, of and from said securities; that the said Brooks gave said directions for the said deliveries to be made as and for the proportions which were respectively to come to this plaintiff and the defendant Mifflin of the securities which had been purchased by him, as aforesaid, from said Potter; that the said American Exchange National Bank still holds in its possession the remainder of the securities transmitted to it with said draft, amounting to about \$4,500 in bonds and 1,000 shares of stock; that the plaintiff is entitled to a lien on the said bonds and shares of stock now remaining in the hands of said bank for all moneys advanced by the plaintiff over and above one-half of the price actually paid by the defendant Brooks upon such purchase, and is entitled to

receive from said stock and bonds in the hands of said bank a sufficient number thereof to complete with the stock and bonds already received by the plaintiff one-half of the amount actually purchased by the defendant Brooks from said Potter.

That the defendant Brooks is, as the plaintiff is informed and verily believes, a non-resident of the State of New York, residing in the City of Boston, in the Commonwealth of Massachusetts, and, as far as plaintiff is informed, he is not a man of means, and if the stock and bonds now in the hands of said bank should be removed from the jurisdiction of this court, the plaintiff would be without a remedy to recover the balance due him on account of advances or any balance which may be due him from said stock and bonds.

Therefore, the plaintiff demands judgment that an account may be taken of the amounts actually paid by the defendant Brooks upon the purchase made by him as hereinbefore set forth, and of the stock and bonds and securities actually received by him upon said purchase; that there may be delivered to the plaintiff by said Brooks from the stock and bonds now in the hands of the said American Exchange National Bank a sufficient amount thereof to complete with the stock and bonds already in the plaintiff's possession, one-half of the purchase actually made by the defendant Brooks; that the said Brooks and the said Miffin may pay to the plaintiff the difference between the amount of money actually advanced by the plaintiff and one-half of the purchase money paid by said Brooks; and that in the meantime, until the final hearing and determination of this action, a Receiver be appointed by order of this court to take the said stock and bonds into his possession and to preserve the same subject to the order and final decree of the court; and that the defendant the American Exchange National Bank be enjoined and restrained by the order of this court from transferring and disposing of the stock and bonds now in its custody and possession; and that the defendant Brooks be enjoined and restrained by the order of this court from transferring, encumbering, or interfering with any of said stock or securities; that the plaintiff recover his costs and disbursements in this action, and have such other and further relief as to the court may seem just.

STICKNEY & SHEPARD,
Plaintiff's Attorneys.

C. Abatement and revival.

An action of accounting may be revived by the substitution of the personal representative of a deceased party. In an action by an executor, in case of the death of the plaintiff, his representative may be substituted.⁸⁸

⁸⁸ Gould v. Gould, 211 App. Div.
78, 207 N. Y. Supp. 4, affirming 122
Misc. 152, 203 N. Y. Supp. 399.

D. Examination before trial.

The details of the accounts between the parties are not in issue until the right to an accounting is established and interlocutory judgment to that effect is rendered. Hence, before the rendering of interlocutory judgment, an examination of an adverse party or an inspection of books or papers in his possession will not be allowed as to the items of the account.⁸⁹ Even after the interlocutory judgment and the filing of an account by the defendant, a general inspection of the papers of the defendant will not be granted before the plaintiff has filed objections to the account and thus raised an issue.⁹⁰ An examination before trial is not allowed unless the materiality thereof is shown. If, however, the right to an accounting is denied, an examination may be proper on that issue;⁹¹ the examination in such a case being limited to those matters on which the right to the accounting is predicated.⁹² An examination may also be had to the nature and extent of the accounting, or as to matters which may affect the relief to be granted by the interlocutory judgment.⁹³

In a proper case the plaintiff may have an examination of

89. *Hausling v. Rheinfrank*, 103 App. Div. 517, 93 N. Y. Supp. 121; *Moore v. Reinhardt*, 132 App. Div. 707, 117 N. Y. Supp. 534; *Del Genovese v. Del Genovese*, 149 App. Div. 266, 133 N. Y. Supp. 765; *Hoisting Machinery Co. v. Scofield Engineering Co.*, 163 App. Div. 883, 147 N. Y. Supp. 564; *Roberts v. Hayden*, 213 App. Div. 1, 209 N. Y. Supp. 598; *Gatner v. Levy*, 128 Misc. 147, 218 N. Y. Supp. 296; *Goodyear v. Phoenix Rubber Co.*, 48 Barb. 522; *Josias v. Sugar Products Co.*, 169 N. Y. Supp. 887, affirmed without opinion, 187 App. Div. 905, 174 N. Y. Supp. 903.

90. *Bencoe v. McDonnell*, 210 App. Div. 123, 205 N. Y. Supp. 343; *Bencoe v. McDonnell*, 210 App. Div. 859, 206 N. Y. Supp. 372.

91. *Del Genovese v. Del Genovese*, 149 App. Div. 266, 133 N. Y. Supp. 765.

92. *Del Genovese v. Del Genovese*,

149 App. Div. 266, 133 N. Y. Supp. 765.

93. *Hoisting Machinery Co. v. Scofield Engineering Co.*, 163 App. Div. 883, 147 N. Y. Supp. 564.

Appropriation of partnership name.—In an action for a co-partnership accounting between the plaintiff and several defendants, in which the plaintiff alleges that defendants have appropriated the partnership name of “Flonzalay Quartet,” the plaintiff is entitled to examine one of the defendants before trial as to whether said defendants have appropriated to their own use the name “Flonzalay Quartet,” for the reason that if plaintiff succeeds in establishing upon the trial the question of the right of the defendants to appropriate and use said trade name, he will be entitled to enjoin the use of said name by defendants, though he may not compel its sale. *Bailey v. Betti*, 126 Misc. 45, 212 N. Y. Supp. 455.

an adverse party in order to enable him to frame his complaint.⁹⁴ The items of the account are not necessary for this purpose, but, if an examination is necessary to ascertain facts as to the relation of the parties or the right to an accounting, to this extent an examination may be had before the complaint is drawn.⁹⁵

E. Venue.

Ordinarily an action of accounting is transitory in nature, and may be tried under section 182 of the Civil Practice Act in a county where one of the parties resided, although the accounting may, in part relate to real estate.⁹⁶ But an action to have a deed declared to be a mortgage and asking for a re-conveyance of the premises to the plaintiff, and also asking for an accounting by the defendant, must be tried in the county where the property is located, as provided in section 183 of the Civil Practice Act.⁹⁷ In a proper case, the place of trial will be changed to subserve the convenience of witnesses.⁹⁸

F. Trial of issues.

1. Issues involved.

The issues created by the pleadings and which come before the court for determination are those relating to the plaintiff's right to an accounting.⁹⁹ Until the right of the plaintiff to an accounting is established, evidence will not be heard as to actual state of the accounts between the parties.¹ An issue as to the proper scope of the accounting must also be determined by the court.² If the pleadings create no issue as to the right or scope of the accounting, interlocutory judgment may be granted on a motion for judgment on

94. *Fatmān v. Fatman*, 45 State Rep. 859, 22 Civ. Proc. R. 149, 18 N. Y. Supp. 847, appeal dismissed, 133 N. Y. 674. See also, *Murphy v. Keenan*, 101 Misc. 443, 167 N. Y. Supp. 55.

95. *Pierce v. McLaughlin Real Est. Co.*, 121 App. Div. 501, 106 N. Y. Supp. 28.

96. *Remo v. Crouse*, 132 Misc. 873, 230 N. Y. Supp. 719.

97. *Bush v. Treadwell*, 11 Abb. Pr. (N. S.) 27. And see, Chapter on Redemption.

98. *Remo v. Crouse*, 132 Misc. 873, 230 N. Y. Supp. 719.

99. *Del Genovese v. Del Genovese*, 149 App. Div. 266, 133 N. Y. Supp. 765; *Second Nat. Bank v. Kean*, 203 N. Y. Supp. 909.

1. *Second Nat. Bank v. Kean*, 203 N. Y. Supp. 909. And see, *infra*, III-G, Interlocutory judgment.

2. *Fisher v. Tuttle*, 164 App. Div. 216, 149 N. Y. Supp. 673; *Morris Park Estates v. Day*, 168 App. Div. 43, 153 N. Y. Supp. 737; *Schnitzer v. Joseph-*

the pleadings.³ But, if the answer contains denials or new matter which place in issue the plaintiff's right to an accounting, the issue must be disposed of before an accounting is directed.⁴

2. Court, jury or referee.

The issues created by the pleadings as to the right to an accounting and its proper scope, are usually tried by the court.⁵ There is no right to a jury trial,⁶ though the court, in its discretion, under section 430 of the Civil Practice Act, may submit specific questions of fact to a jury. Or, upon the consent of the parties, the issues created by the pleadings may be sent to a referee.⁷ But, without the consent of the parties, the court cannot direct a reference on all of the issues in the action.⁸ If the issues are referred to a referee, and he decides in favor of the plaintiff, interlocutory judgment may be entered on his report, and the matter is sent back to the same or a different referee to take the account.⁹

There may be a separate trial of a counterclaim under section 424 of the Civil Practice Act. But the items of the defendant's account which are favorable to him cannot constitute a counterclaim under this section.¹⁰

thal, 122 Misc. 15, 202 N. Y. Supp. 77, affirmed, 202 App. Div. 769, 202 N. Y. Supp. 952.

3. *Fisher v. Tuttle*, 164 App. Div. 216, 149 N. Y. Supp. 673; *Second Nat. Bank v. Kean*, 203 N. Y. Supp. 909.

4. *Hutchinson v. Birdsong*, 211 App. Div. 316, 207 N. Y. Supp. 273.

5. *Fisher v. Tuttle*, 164 App. Div. 216, 149 N. Y. Supp. 673; *Pendergast v. Greenfield*, 27 St. Rep. 885, 7 N. Y. Supp. 829.

6. *Whiton v. Spring*, 74 N. Y. 169; *Brinckerhoff v. Bostwick*, 105 N. Y. 567; *Pendergast v. Greenfield*, 27 St. Rep. 885, 7 N. Y. Supp. 829.

7. *Osborn v. Cardeza*, 203 N. Y. 131;

Smith v. Fitchett, 56 Hun 473, 10 N. Y. Supp. 459, 31 St. Rep. 608; *Garczynski v. Russell*, 75 Hun 512, 27 N. Y. Supp. 461; *Myers v. Bolton*, 89 Hun 342, 35 N. Y. Supp. 577; *Bouton v. Bouton*, 42 How. Pr. 11.

8. *Jordan v. Underhill*, 71 App. Div. 559, 76 N. Y. Supp. 95.

9. *McMahon v. Allen*, 27 Barb. 335; *Smith v. Fitchett*, 56 Hun 473, 10 N. Y. Supp. 459, 31 St. Rep. 608.

10. *Reeves v. Bushby*, 25 Misc. 226, 55 N. Y. Supp. 70; *Norwegian Atlas Ins. Co. v. Northern Underwriters Agency*, 124 Misc. 185, 207 N. Y. Supp. 277, affirmed, 212 App. Div. 805, 207 N. Y. Supp. 886.

3. Form of decision.¹¹

DECISION.

SUPREME COURT—KINGS COUNTY.

EDNA W. MINION AND RALPH A.	}
FROST,	

Plaintiffs,

vs.

CLARA F. WARNER,	}
Defendant,	

This action having regularly come on for trial and having been heard before Hon. Russell Benedict, one of the Justices of this Court, without a jury, at a Special Term, Part III, of this Court, held on the 1st and 2nd days of December, 1919, upon the pleadings and proceedings herein, plaintiffs having appeared by Walter Jeffreys Carlin, Esq., their attorney, and the defendant having appeared by William F. Connell, Esq., her attorney, and the proofs having been adduced by their respective counsel and due deliberation having been had thereon, I do hereby decide and find as follows:

FINDINGS OF FACT.

1. That John S. Frost died in the County of Kings in the year 1910, and that his will was duly admitted to probate on the 14th day of April, 1910, in the Kings County Surrogate's Court and letters testamentary were duly issued thereon to defendant.

2. That, pursuant to the terms of said will the following pieces of real estate known as 178 Halsey Street, 176 Halsey Street, 975 Atlantic Avenue, 100 Lefferts Place, Borough of Brooklyn, City of New York, were devised to the plaintiffs and the defendant herein jointly and they became at the said time, to wit, on the 14th day of April, 1910, vested with the title to said properties as tenants in common.

3. That under the will of John S. Frost, duly probated April 14th, 1910, the plaintiff and the defendant became equal tenants in common of the premises described as follows:

178 Halsey Street,
176 Halsey Street,
975 Atlantic Avenue,
100 Lefferts Place,

all in the Borough of Brooklyn, County of Kings.

4. That the defendant, since the death of said John S. Frost, and until she sold same collected the rents of said premises.

5. That the plaintiff, Ralph A. Frost, is a son of the decedent, John S. Frost; and that the plaintiff, Edna W. Minion, and the

11. This form of decision is adapted from that used in *Minion v. Warner*, 238 N. Y. 413.

defendant, Clara F. Warner, are daughters of the said decedent, John S. Frost.

6. That since the death of the said John S. Frost the defendant, Clara F. Warner, has collected all the rents and profits of the real property of the decedent, all of which properties are located in the Borough of Brooklyn, County of Kings, and are known and described as 178 Halsey Street, 176 Halsey Street, 975 Atlantic Avenue and 100 Lefferts Place, and she has not accounted to the plaintiffs for any of the moneys so collected by her.

7. That the plaintiffs are without knowledge of the amount of the said rents and profits and the amount due them and are without an adequate remedy at law.

8. That the defendant has made certain expenditures and disbursements for the maintenance of said properties which are properly a matter of accounting between the plaintiffs and defendant.

9. That the defendant has not paid to the plaintiffs any part of the rents or profits of the above described real estate to the plaintiffs or either of them.

10. That no evidence was submitted to establish or prove the defendant's counterclaim except that it was stated that certain disbursements on the properties in question had been made by defendant.

CONCLUSIONS OF LAW.

1. That defendant should account to plaintiffs for all sums of money or rents or other profits collected by her from the real properties known as 178 Halsey Street, 176 Halsey Street, 975 Atlantic Avenue, 100 Lefferts Place, Borough of Brooklyn, City of New York.

2. That the plaintiffs are each entitled to a one-third interest in the rents and profits of the above-described real estate and that the defendant is entitled to one-third of the net rents and profits of the real estate.

3. That the defendant should be directed and permitted to account for all proper disbursements made by her in reference to the said real estate.

4. That a Referee should be appointed to take and state the account and to hear and determine the issues respecting the said account and report to this Court.

That judgment should be entered accordingly.

Dated, December 26, 1919.

RUSSELL BENEDICT,
Justice of the Supreme Court,
State of New York.

G. Interlocutory judgment.

1. In general.

Upon the determination of the issues created by the pleadings, an interlocutory, not a final, judgment is rendered.¹²

¹² Brennan v. Gale, 56 App. Div. Fessenden, 208 App. Div. 315, 203 N. 4, 67 N. Y. Supp. 382; Langford v. Y. Supp. 301; Moore v. Reinhardt, 132

The interlocutory judgment establishes the right to an accounting, and makes directions as to the scope thereof.¹³ It directs the defendant to account.¹⁴ It usually appoints a referee under section 467 of Civil Practice Act to hear the evidence of the parties and to take the account between the parties, and report to the court;¹⁵ though, of course, the court has power to settle the account without the appointment of a referee.¹⁶ It may prescribe the procedure to be followed by the referee.¹⁷ The interlocutory judgment may appoint a receiver of property owned jointly by the parties.¹⁸

App. Div. 707, 117 N. Y. Supp. 534; *Waters v. Hall*, 218 App. Div. 149, 218 N. Y. Supp. 31, affirmed, 244 N. Y. 557; *Hathaway v. Russell*, 7 Abb. N. C. 138, 13 Jones & S. (45 Super. Ct.) 538, affirmed, 14 Jones & S. (46 Super. Ct.) 103; *Garczynski v. Russell*, 75 Hun 512, 27 N. Y. Supp. 461.

13. *Schnitzer v. Josephthal*, 122 Misc. 15, 202 N. Y. Supp. 77, affirmed, 203 App. Div. 769, 202 N. Y. Supp. 952.

14. *Baum v. Lamborn*, 203 App. Div. 86, 196 N. Y. Supp. 478.

"Account to plaintiff."—The defendant cannot be directed by the judgment to account to the plaintiff. The accounting must be made before the court or a referee. *Silliman v. Smith*, 72 App. Div. 621, 76 N. Y. Supp. 65.

15. **Reserving questions for future determination.**—It is competent for a court, by its interlocutory judgment, to direct the referee named therein to take and state an account, and to ascertain the amount of the expenses of the administration of a certain trust, and to report the same to the court, reserving the question as to whether certain expenses claimed as a charge should be allowed or not until the coming in of the referee's report, when it may determine by its final judgment whether or not such expenses should be allowed. *Rogers v. New York & T. Land Co.*, 87 Hun 107, 33 N. Y. Supp. 840, 67 St. Rep. 452.

16. *Silliman v. Smith*, 72 App. Div.

621, 76 N. Y. Supp. 65; *Weldon v. Brown*, 84 App. Div. 482, 82 N. Y. Supp. 1051.

Books offered in evidence.—The fact that, upon the trial of the issue as to the right of the plaintiff to an accounting, books containing some of the accounts were offered in evidence, does not preclude the court from directing an interlocutory judgment for an accounting, instead of taking the account itself. *Brennan v. Gale*, 56 App. Div. 4, 67 N. Y. Supp. 382.

Defendant entitled to hearing on accounts.—Where, in an action by a customer against a stockbroker to obtain an accounting, the only question really litigated was whether the plaintiff had authorized the defendant to buy a total of 250 shares as contended by the plaintiff, or 400 shares as contended by the defendant, the court, without a reference and without notice to the defendant that it would take and state the account, ordered judgment for the plaintiff, and the defendant was deprived of his day in court beyond the issue as to whether there should be an accounting, and, therefore, the judgment should be reversed and an interlocutory judgment entered compelling defendant to account for 250 shares. *Langford v. Fessenden*, 208 App. Div. 315, 203 N. Y. Supp. 301.

17. *Hathaway v. Russell*, 14 Jones & S. (46 Super. Ct.) 103.

18. See, *infra*, III-H, Receivership.

There must be a determination of the rights of the parties and the scope of the accounting before a referee can be appointed to take the accounts.¹⁹ If, in order to secure an accounting, the plaintiff must have relief setting aside a general release signed by him, a referee should not be appointed to take the account, until the validity of the release has been determined.²⁰ On the other hand, if the consent of the parties is sufficiently broad, an order of reference may be made which will authorize the referee to determine all of the issues between the parties, including the items of the accounts, without an intervening interlocutory judgment.²¹ Although interlocutory judgment appointing a referee has not been entered, if a party proceeds to trial before the referee, taking his chances on a favorable decision by the referee, he cannot complain, if the referee's decision is adverse to his contentions, that an interlocutory judgment should have been made.²²

19. *Coit v. Goodhart*, 5 App. Div. 115, 39 N. Y. Supp. 47; *Hilton v. Hughes*, 5 App. Div. 226, 39 N. Y. Supp. 204; *Brennan v. Gale*, 44 App. Div. 396, 61 N. Y. Supp. 6; *Woodbridge v. First National Bank*, 45 App. Div. 166, 61 N. Y. Supp. 258, affirmed, 166 N. Y. 238; *New York Bank Note Co. v. Hamilton Bank Note Engraving Co.*, 56 App. Div. 488, 67 N. Y. Supp. 827; *Jordan v. Underhill*, 71 App. Div. 559, 76 N. Y. Supp. 95; *Kirkwood v. Smith*, 72 App. Div. 429, 75 N. Y. Supp. 1016; *Weldon v. Brown*, 84 App. Div. 482, 82 N. Y. Supp. 1051; *Moore v. Reinhardt*, 132 App. Div. 707, 117 N. Y. Supp. 534; *Del Genovese v. Del Genovese*, 149 App. Div. 266, 133 N. Y. Supp. 765; *Fisher v. Tuttle*, 164 App. Div. 216, 149 N. Y. Supp. 673; *Morris Park Estates v. Day*, 168 App. Div. 43, 153 N. Y. Supp. 737; *Hutchinson v. Birdsong*, 211 App. Div. 316, 207 N. Y. Supp. 273; *Second Nat. Bank v. Kean*, 203 N. Y. Supp. 909.

20. *O'Connor v. O'Connor*, 202 App. Div. 7, 195 N. Y. Supp. 308.

General release.—In an action for an

accounting in which an issue raised by the reply of the plaintiff to the effect that a general release pleaded by the defendant was obtained by fraud was ordered to be tried first, the judge before whom the issue came on for trial had the power to send the issue back when it appeared that the trial of that issue involved the trial of the accounting action, but the judge did not have power to find that the release pleaded as a defense was a general release which was only one of a number of facts to be found in order to determine the issue sent to him for trial. *Insurance Co. of N. A. v. Whitlock*, 207 App. Div. 319, 202 N. Y. Supp. 39.

21. *Osborn v. Cardeza*, 208 N. Y. 131; *Nicholas v. Farmers L. & T. Co.*, 213 App. Div. 547, 214 N. Y. Supp. 266.

22. *Ludington v. Taft*, 10 Barb. 447; *McCall v. Moschowitz*, 10 Civ. Proc. 107, 14 Daly 16, 1 State Rep. 99. See also *Gordon v. Krellman*, 207 App. Div. 773, 202 N. Y. Supp. 682.

2. Relief granted as of time of trial.

In an equity action it is sufficient that a ground for relief exists at the time of the trial.²³ The court will grant relief in accordance with the conditions as they exist at the time of the trial.²⁴ The fact that the plaintiff was not entitled to the relief sought at the time of the commencement of the action does not necessarily require a dismissal.²⁵

3. Form of interlocutory judgment.²⁶

(Title.)

(Caption.)

The issues of this action having regularly come on for trial before Mr. Justice Russell Benedict at a Special Term, Part III of this Court, held in and for the County of Kings, at the County Court House in the Borough of Brooklyn, City of New York, on the 1st and 2nd days of December, 1919, and after reading and filing the summons and complaint herein and the answer and reply, and after hearing Walter Jeffreys Carlin, Esq., attorney for the plaintiffs, and William F. Connell, Esq., attorney for the defendant, and the Court having heard the allegations and proofs of the parties and after due deliberation having duly made and filed its decision, dated on the 26th day of December, 1919, containing the statement of facts found and the conclusions of law thereon and directing judgment as hereinafter stated,

Now, on motion of Walter Jeffreys Carlin, attorney for the plaintiffs, it is

Ordered, adjudged and decreed that the defendant should account to the plaintiffs for all sums of money and all the rents of the properties known as 178 Halsey Street, Brooklyn, N. Y.; 176 Halsey Street, Brooklyn, N. Y.; 975 Atlantic Avenue, Brooklyn, N. Y.; 100 Lefferts Place, Brooklyn, N. Y.; collected by defendant from time of death of decedent, John S. Frost, to the following dates: 178 Halsey Street, to October 1, 1912; 176 Halsey Street, to April 1, 1913; 975 Atlantic Avenue, to March 14, 1916; 100 Lefferts Place, to March 14, 1916; and it is

Further ordered, adjudged and decreed that defendant account to the plaintiffs as to all other matters and transactions in reference to this property from the time when the plaintiffs became interested therein, and it is

Further ordered, adjudged and decreed that all disbursements made by the defendant in reference to the said properties, 178 Halsey Street, 176 Halsey Street, 975 Atlantic Avenue and 100 Lefferts Place, be stated in said account, and it is

Further ordered, adjudged and decreed that the defendant should

23. *Warnier v. Boessneck*, 5 App. Div. 240, 39 N. Y. Supp. 141, affirmed on opinion below, 159 N. Y. 538.

24. *Bailly v. Betti*, 241 N. Y. 22.

25. *Breckenridge v. Cary*, 195 App. Div. 156, 185 N. Y. Supp. 300.

26. This form is adapted from that used in *Minion v. Warner*, 238 N. Y. 413.

file a verified account as to all the matters above mentioned within ten (10) days from the service of this interlocutory judgment upon her attorney, and it is

Further ordered, adjudged and decreed that the said account be and the same hereby is referred to William A. Alcock, Esq., as Referee, to take and state the accounts of the defendant and to report thereon to this Court, and it is

Further ordered, adjudged and decreed that the defendant be directed to pay to plaintiffs any sum or sums of money which may be found to be due them upon said accounting, and that if said accounting, as adjusted, discloses a balance due to defendant from plaintiffs, the plaintiffs be directed to pay to defendant, the money so found due, and it is

Further ordered, adjudged and decreed that the parties hereto may apply at the foot of this interlocutory judgment for such other and further directions as may be necessary in this proceeding, including the final judgment settling the said accounts.

Enter,

R. B.,
J. S. C.

H. Receivership.

In an action of accounting between partners, the interlocutory judgment may appoint a receiver to hold the assets of the firm which have not been distributed, or to convert the same into cash.²⁷ And, if there is danger of waste or

27. *Trufant v. Merrill*, 6 Abb. Pr. N. S. 462, 37 How. Pr. 531, 31 Super. Ct. (1 Sweeny) 462; *Smith v. Fitchett*, 15 Civ. Proc. 207, 17 State Rep. 976, 2 N. Y. Supp. 261; *Smith v. Fitchett*, 56 Hun 473, 10 N. Y. Supp. 459, 31 State Rep. 608. And see, *Partnership Law*, § 75.

Specific property.—A receiver will not be appointed over specific property alleged to belong to a partnership without proof satisfactory to the court that such specific property is in fact property of the partnership. *Gregory v. Gregory*, 31 Super. Ct. (1 Sweeny) 613.

Judgment in favor of receiver.—In an action for an accounting, brought by the executors of a deceased partner against the surviving partner of a firm, a judgment was rendered directing defendant to pay over to a receiver a specified sum, and to turn over to

him the partnership assets remaining, out of which the receiver was directed to pay plaintiffs, a sum stated, and to divide the residue; thereupon a judgment was docketed in favor of plaintiffs, against defendant, for the amount the latter was required to pay; on motion to vacate the docket in this particular, held, that it was not authorized by the judgment and was properly vacated; that the docket, if any was authorized, should have been in favor of the receiver; that it was not sufficient that it appeared, plaintiffs would be entitled to as large or a larger sum when the judgment is fully carried out; there was no personal money judgment between the parties, the money required to be paid the receiver was partnership money, and the demand of plaintiffs was to be paid by the receiver from firm assets. *Geery v. Geery*, 79 N. Y. 565.

damage to the firm property, a receiver may be appointed by order before an interlocutory judgment is rendered.²⁸ A receivership is authorized under subdivision 1 of section 974 of the Civil Practice Act.²⁹ The court has inherent power to enjoin a party from interfering with property in the receiver's hands,³⁰ and frequently exercises such power on the appointment of a receiver.³¹ If the parties have equal rights to the possession of the joint assets, and one has enjoined the other from receiving or disposing of them, on the application of the latter, a like injunction will be granted against the former, without any proof of insolvency or other special cause for depriving him of control.³²

A receiver of partnership property appointed in an action for the dissolution of the partnership has only common law powers, not the powers granted by statute or rule to re-

Death of partner.—A receiver may be appointed although one of the partners has died since the dissolution of the firm. *Martin v. Smith*, 53 Super. Ct. (21 J. & S.) 277.

Partnership not established.—Where upon an application for a receivership of the property of an alleged co-partnership between the plaintiff and the individual defendant the affidavits of the plaintiff and defendant are conflicting, and giving the plaintiff the most favorable interpretation of his claim and assuming the truth of the averments of his affidavits, it is clear that no partnership ever was formed, an order appointing receivers *pendente lite* of the alleged partnership property will be reversed. *Armstrong v. Rickard*, 199 App. Div. 880, 192 N. Y. Supp. 502.

28. *Wetter v. Schlieper*, 4 E. D. Smith 707, 6 Abb. Pr. 123, 15 How. Pr. 268; *McCracken v. Ware*, 5 Super. Ct. (3 Sandf.) 688; *Davis v. Grove*, 25 Super. Ct. (2 Rob.) 134; *Martin v. Smith*, 53 Super. Ct. (21 J. & S.) 277.

Discretion of court.—Where it appears that the partnership between the plaintiff and the defendants is positively denied, that a very small

proportion of the partnership capital was originally contributed by the plaintiff, and that by the allowance of an injunction and the appointment of a receiver, the large partnership business will be arrested and perhaps ruined, the order for an injunction and receiver will be set aside, on the defendants giving ample security that they will pay the plaintiff any sum found to be due him on a proper accounting. A provisional remedy is only auxiliary to ultimate relief, and should never usurp or anticipate the office and effects of a trial on the merits. *Popper v. Scheider*, 7 Abb. Pr. N. S. 56, 38 How. Pr. 34.

29. *Smith v. Fitchett*, 15 Civ. Proc. 207, 17 State Rep. 976, 2 N. Y. Supp. 261.

30. *Dhembi v. Carameta*, 124 Misc. 452, 209 N. Y. Supp. 158, holding that an enjoining order of this character need not recite the grounds upon which it was granted.

31. *Wetter v. Schlieper*, 4 E. D. Smith 707, 6 Abb. Pr. 123, 15 How. Pr. 268; *Davis v. Grove*, 25 Super. Ct. (2 Rob.) 134.

32. *McCracken v. Ware*, 5 Super. Ct. (3 Sandf.) 688.

ceivers in some instances, such as receivers of corporations or of judgment debtors.³³ He is entitled to possession of all of the property of the firm in the hands of any party at the time of his appointment.³⁴ He may maintain an action to secure the possession or the value of such property,³⁵ but should first procure an order authorizing the maintenance of the action.³⁶

Final judgment is not rendered in the action until the receiver has disposed of the assets. Upon the filing of the receiver's accounts, it is sent to the referee so that it may be included in the statement of the accounts between the parties.³⁷

I. Proceedings before referee.

1. Procedure before referee.

The proper practice where a party is adjudged to account before a referee appointed by it, is that prescribed by the old 107th Chancery rule, and the party so directed should prepare and file and verify an account of the matter as he claims the facts to be. If such account is satisfactory to the opposing party, that is an end of the matter. If it is not, the other party should file his objections and specify what is wrong and what surcharges he claims should be made. In this manner issues for litigation are made concerning specific items and the mass of uncontested items are eliminated from proof and further consideration until the making up of the findings and report.³⁸ If, however, the parties without objection proceed in some other manner, they cannot afterwards complain.³⁹ In a proper case, the

33. *Rogers v. Landers*, 128 Misc. 208, 218 N. Y. Supp. 98.

34. *Rogers v. Landers*, 128 Misc. 208, 218 N. Y. Supp. 98.

35. *Rogers v. Landers*, 128 Misc. 208, 218 N. Y. Supp. 98.

36. **Objection waived.**—The objection that the receiver has not procured an order for the maintenance of the action, if the defect appears upon the face of the complaint, is waived unless it is raised by motion within twenty days after the service of the complaint. *Rogers v. Landers*, 128 Misc. 208, 218 N. Y. Supp. 98.

37. *Trufant v. Merrill*, 6 Abb. Pr. N. S. 462, 37 How. Pr. 531, 31 Super Ct. (1 Sweeny) 462.

38. *New York Bank Note Co. v. Hamilton Bank Note Engraving Co.*, 56 App. Div. 488, 67 N. Y. Supp. 827; *Klinger v. Rosenfeld*, 120 App. Div. 396, 105 N. Y. Supp. 214. "In surcharging or falsifying an account stated, particular items must be stated in the pleadings." *Lord v. Speilman*, 29 App. Div. 292, 61 N. Y. Supp. 534.

39. *Klinger v. Rosenfeld*, 120 App. Div. 396, 105 N. Y. Supp. 214.

plaintiff may have an examination of the defendant in order to frame his objections, but will not be granted a general inspection of the defendant's books before filing objections.⁴⁰

2. Power of referee.

The referee is bound by the interlocutory judgment and must follow it.⁴¹ He may require the filing of an account by the defendant, and may require him to produce on the trial all necessary books and papers.⁴² The rule in equitable actions permits a decree settling the account as of the time of the trial of the issues, and hence the referee should take and state the accounts down to the time of the hearing.⁴³ The accounts of both parties should be taken, for judgment may be rendered in favor of the defendant, although he has not interposed a counterclaim or asked for affirmative relief.⁴⁴ Both parties must account so that their mutual accounts may be adjusted.⁴⁵

3. Burden of proof.

The burden is upon a fiduciary of showing that his trust duties have been performed, and the manner of their performance.⁴⁶ It is assumed that the fiduciary has means of knowing and does know what the *cestui que trust* cannot

40. *Bencoe v. McDonnell*, 210 App. Div. 859, 206 N. Y. Supp. 372.

41. *Kirkwood v. Smith*, 132 App. Div. 758, 117 N. Y. Supp. 686.

42. *Moore v. Reinhardt*, 132 App. Div. 707, 117 N. Y. Supp. 534; *Fraser v. Phelps*, 6 Super. (4 Sandf.) 682.

43. *Darling v. Brewster*, 55 N. Y. 667; *Gordon v. Krellman*, 207 App. Div. 773, 202 N. Y. Supp. 682; *Tyler v. Willis*, 35 Barb. 213, 13 Abb. Pr. 369; *Bonn v. Steiger*, 2 State Rep. 90; *Crosbie v. Leary*, 19 Super. Ct. (6 Bosw.) 312.

44. *United States Trust Co. v. Greiner*, 124 Misc. 458, 209 N. Y. Supp. 105, affirmed, 215 App. Div. 659, 212 N. Y. Supp. 931; *Fairchild v. Valentine*, 30 Super. Ct. (7 Rob.) 564; *White v. White*, 58 Super. Ct. (26 J. & S.) 333, 33 State Rep. 801, 11 N. Y. Supp. 575, modified, 124 N. Y. 468. But, if the items accruing after the commence-

ment of the action are not included, a party entitled thereto is not precluded from recovering the same in a subsequent action. *Tyler v. Willis*, 35 Barb. 213, 13 Abb. Pr. 369.

45. *Fairchild v. Valentine*, 30 Super. Ct. (7 Rob.) 564.

46. *Marvin v. Brooks*, 94 N. Y. 71; *White v. Rankin*, 18 App. Div. 293, 46 N. Y. Supp. 228, affirmed without opinion, 162 N. Y. 622; *Frethy v. Durant*, 24 App. Div. 53, 48 N. Y. Supp. 839; *New York Bank Note Co. v. Hamilton Bank Note Engraving Co.*, 56 App. Div. 488, 67 N. Y. Supp. 827; *Potomac Ins. Co. v. Kelly*, 173 App. Div. 791, 160 N. Y. Supp. 161; *Itell v. Malone*, 154 N. Y. Supp. 275. "Such an accounting, when decreed between parties standing in a confidential relation, and followed by proof of money or property intrusted to the agent, throws upon the latter the burden of

know, and he is bound to reveal the entire truth.⁴⁷ If part of the trust funds are disbursed by check, the fiduciary is required to show that the payments were for the benefit or account of the beneficiary.⁴⁸ If a trustee fails to keep clear and accurate accounts of his dealings with the fiduciary property, all doubts and obscurities are resolved against him.⁴⁹ If, however, an account stated between the parties is shown, the burden of impeaching the account is upon the party charging error therein.⁵⁰

4. Misconduct by referee.

Where it appears that in an action by a testamentary trustee to procure the judicial settlement of his accounts there was no stipulation for the payment to a referee of his fees prior to the termination of the reference, and such payment was made and accepted without the knowledge of one of the parties to the reference, the referee must be removed from office, even though he was not in any wise prejudiced and did not manifest favoritism toward the party making such payment or display any animosity against the party not actively concerned therein.⁵¹

rendering an account and an explanation, and requires him to show that his trust duties have been performed and the manner of their performance. Such a decree proceeds upon the ground that the defendant stands in the attitude of an agent dealing to some extent with the money or property of the other party; intrusted in a confidential relation with an interest which makes him a quasi trustee, and by reason of that relation knowing that the other party cannot know, and bound to reveal to him the entire truth. The equitable jurisdiction has always rested largely upon such relation of confidence, involving the need of discovery and the duty of explanation, and hence the burden of such explanation and the proof of its truth fell in such cases, upon the defendant whose conduct was questioned, whenever an accounting was decreed, and required of him the extreme of good faith." *Marvin v. Brooks*, 94 N. Y. 71.

Action by remainderman.—Where a testator gave to his wife the use of his real and personal property during life with a beneficial power of disposition, the burden is upon the remainderman who seeks to compel the wife's executor to account, to show that there was or should have been at her death a remainder to which he was entitled. *Seaward v. Davis*, 133 App. Div. 191, 117 N. Y. Supp. 468, modified, 198 N. Y. 415.

47. *Frethy v. Durant*, 24 App. Div. 58, 48 N. Y. Supp. 839.

48. *Hamilton v. Hamilton*, 15 App. Div. 47, 44 N. Y. Supp. 97.

49. *White v. Rankin*, 18 App. Div. 293, 46 N. Y. Supp. 228, affirmed without opinion, 162 N. Y. 622; *Itell v. Malone*, 154 N. Y. Supp. 275.

50. *Jagger v. Littlefield*, 10 Week. Dig. 429.

51. *Robinson v. Ball*, 187 App. Div. 799, 176 N. Y. Supp. 273.

5. Report of referee.

The report of the referee should state the accounts between the parties, not merely state the balance due to one party.⁵² No specific request upon the trial is necessary in order to raise the question that the referee has not stated the account between the parties, as the parties have the right to assume that the report will be in proper form in this respect.⁵³ The referee should not make any directions for the delivery of assets to persons who are not parties to the action.⁵⁴ If two or more fiduciaries are accounting, it is proper to state their accounts separately, as between the trustees respectively and the beneficiaries, although each trustee may be liable as a matter of law for the defaults or misconduct of his co-trustee.⁵⁵

J. Final judgment.

1. In general.

Final judgment should not be rendered until the referee has stated the accounts of the parties.⁵⁶ The action should not be turned into an action at law so as to render a judgment for a sum of money without stating the accounts between the respective parties.⁵⁷ A judgment as in an action at law has the effect of depriving a party of his constitutional right to a jury trial, and hence is unauthorized.⁵⁸

The fact that the accounting shows that there is no balance due to the plaintiff, or that, in fact, the balance of accounts is in favor of the defendant, does not require a dismissal of the action. The judgment may find a balance in favor of the defendant, although he has set up no counterclaim in his answer and has not asked for any affirmative relief.⁵⁹

52. *Williams v. Lindblom*, 68 Hun 173, 22 N. Y. Supp. 678, 52 St. Rep. 78, affirmed on opinion below, 142 N. Y. 682.

53. *Williams v. Lindblom*, 68 Hun 173, 22 N. Y. Supp. 678, 52 St. Rep. 78, affirmed on opinion below, 142 N. Y. 682.

54. *Miffin v. Brooks*, 18 Week. Dig. 531.

55. *Spencer v. Spencer*, 11 Paige 299.

56. *Williams v. Lindblom*, 68 Hun 173, 22 N. Y. Supp. 678, 52 St. Rep. 78, affirmed on opinion below, 142 N. Y. 682.

57. *Williams v. Lindblom*, 68 Hun 173, 22 N. Y. Supp. 678, 52 St. Rep. 78, affirmed on opinion below, 142 N. Y. 682.

58. *Lewis v. Varnum*, 12 Abb. Pr. 305.

59. *Consolidated Fruit Jar Co. v. Wisner*, 110 App. Div. 99, 97 N. Y.

The debts of a partnership should be adjusted before the accounts as between the partners are stated.⁶⁰ In the settlement of partnership dealings, the state of the accounts between each partner and the firm, and between the partners themselves, should show the amount of profit or loss, and the amount which each owes, or which he is entitled to receive. The court will compel those who have received of the partnership property more than their share, to pay to those who have received less, an amount sufficient to make an equal division of the assets of the firm.⁶¹ As to each partner who has underdrawn, all the others are liable to him for their respective portions of the amount of the underdraft; and as to each partner who has overdrawn, he is liable to all the others for their respective portions of such overdraft.⁶²

2. Form of final judgment.⁶³

(Title.)

(Caption.)

An application having been made by the plaintiffs on the 10th day of July, 1923, for final judgment herein and for an order confirming the report of William A. Alcock, Esq., duly appointed as referee to take and state an account between the parties hereto, now on reading the summons, complaint and answer herein, the interlocutory judgment filed on December 26, 1919, the account duly verified the 21st day of March, 1922, and filed herein by the defendant in the office of the Clerk of the County of Kings, and the objections to said account duly verified the 16th day of April, 1923, and filed on April 20, 1923, the requests to find, the Referee's report and opinion filed the 10th day of July, 1923, and the exceptions thereto and on the notice of motion to confirm said report, the offer of judgment dated March 10, 1918, and on the affidavit of Walter E. Warner duly verified the 31st day of July, 1923, and on all the papers and proceedings and after hearing Walter Jeffreys Carlin in support of the said motion and Walter E. Warner, of counsel, in opposition thereto, it is

Ordered, adjudged and decreed that the report of the Referee be duly confirmed in all respects and as to all parts thereof,

Supp. 52, affirmed without opinion, 188 N. Y. 624; *United States Trust Co. v. Greiner*, 124 Misc. 458, 209 N. Y. Supp. 105, affirmed, 215 App. Div. 659, 212 N. Y. Supp. 931; *Scott v. Pinkerton*, 3 Edw. 70; *White v. White*, 58 Super. Ct. (26 J. & S.) 333, 33 St. Rep. 801, 11 N. Y. Supp. 575, modified, 124 N. Y. 463.

60. *Hayes v. Reese*, 34 Barb. 151.

61. *Spier v. Hyde*, 47 Misc. 443, 95 N. Y. Supp. 952; *Rhiner v. Sweet*, 2 Lans. 386; *Salomon v. Skinner*, 5 Week. Dig. 491.

62. *Butler v. Ballard*, 43 Super. Ct. (11 J. & S.) 191.

63. This form is adapted from that used in *Minion v. Warner*, 238 N. Y. 413.

Further ordered, adjudged and decreed that the plaintiffs recover from the defendant the sum of \$4,253.59 with interest thereon from June 15, 1923 in the sum of \$31.90 and the further sum of \$121.00 costs as taxed, amounting in all to \$4,406.49.

Enter,

CROPSEY,
J. S. C.

K. Appeals.

An appeal from an interlocutory judgment may be taken to the Appellate Division under section 611 of the Civil Practice Act.⁶⁴ An appeal from the final judgment may be taken to the same court under section 608; and, on an appeal from the final judgment, the interlocutory judgment may be reviewed under section 580. A further appeal to the Court of Appeals may be taken under the limitations of sections 588 and 589.⁶⁵

The Court of Appeals recognizes that it is an unsuitable tribunal for the examination of complicated accounts; and it looks into the accounts so far only as to see whether, upon admitted facts, an error of law has been committed. The conclusions of fact, as found by the Trial Term and the Appellate Division, are accepted.⁶⁶

In an equity action, such as an action of accounting, a new trial will not be granted for errors in the admission or exclusion of evidence if the case has been rightly decided upon sufficient and competent evidence.⁶⁷ A party cannot complain that certain values were computed on an erroneous theory, if the theory he proposes would not be more favorable in result.⁶⁸

An interlocutory decree made in a partnership accounting is binding upon the referee and, when affirmed by the Appellate Division, will be followed by that court on a subsequent appeal from the final judgment entered on the report of the referee.⁶⁹

64. *Weil v. Levy*, 80 Hun 382, 61 St. Rep. 841, 30 N. Y. Supp. 127.

65. See *Walker v. Spencer*, 86 N. Y. 162.

66. *Grandolfo v. Appleton*, 40 N. Y. 533.

67. *Marsh v. Pierce*, 21 Week. Dig. 51.

68. *Blanchard v. Jefferson*, 13 App. Div. 314, 43 N. Y. Supp. 152, affirmed without opinion, 162 N. Y. 630.

69. *Kirkwood v. Smith*, 132 App. Div. 758, 117 N. Y. Supp. 686.

L. Costs.

The awarding of costs in an action of accounting is discretionary under section 1477 of the Civil Practice Act.⁷⁰ If interlocutory judgment is granted directing an accounting, the question of costs may be deferred until the accounts are stated by the referee and application is made for final judgment.⁷¹ Or the interlocutory judgment may provide for costs arising out of the issues created by the pleadings.⁷² The diligence of the parties, their good or bad faith, their candor and willingness to have the accounts settled, the situation of the parties, are all proper elements to be considered in awarding costs. They are to be awarded or refused according to the justice of each particular case.⁷³

A plaintiff may recover costs although he has not succeeded in all of his claims.⁷⁴ Costs may be refused to both parties where neither was entirely successful.⁷⁵ The plaintiff may be refused costs if his rights had not matured at the commencement of the action, although relief is granted to him because his right matured before trial.⁷⁶

If a fiduciary's accounts are substantially correct and he has been guilty of no bad faith, costs will not ordinarily be charged against him.⁷⁷ If part of the fund remains in the hands of the accounting party, the costs of one or both parties may be paid out of this fund.⁷⁸ If a trustee has

70. *Osborn v. Cardeza*, 208 N. Y. 131; *Breckenridge v. Cary*, 195 App. Div. 156, 185 N. Y. Supp. 300.

71. *Williams v. Lindblom*, 68 Hun 173, 22 N. Y. Supp. 678, 52 St. Rep. 78, affirmed on opinion below, 142 N. Y. 682.

72. Referee.—If the issues made by the pleadings are referred to a referee he may allow costs to be taxed by the interlocutory judgment. *Osborn v. Cardeza*, 208 N. Y. 131; *Ludington v. Taft*, 10 Barb. 447.

Costs against trustee personally or out of trust fund.—Where an action to compel an accounting by a trustee has resulted in an interlocutory judgment directing payment to plaintiff of a specified sum with costs, and a reference is ordered to determine whether the costs shall be paid out

of the estate or by the trustee personally, the trustee cannot be permitted to retain the costs of defending the action from the sum decreed to be paid, as this would forestall the decision on the question of costs. *Gomez v. Gomez*, 20 N. Y. Supp. 901, 49 St. Rep. 646.

73. *Osborn v. Cardeza*, 208 N. Y. 131.

74. *Rutty v. Person*, 52 Super. Ct. (20 J. & S.) 329.

75. *Caldwell v. Leiber*, 7 Paige 483; *Spencer v. Spencer*, 11 Paige 299; *Beacham v. Eckford*, 2 Sandf. Ch. 116.

76. *Breckenridge v. Cary*, 195 App. Div. 156, 185 N. Y. Supp. 300.

77. *Morsch v. Schoenbaum*, 200 App. Div. 441, 193 N. Y. Supp. 266; *Smith v. Smith*, 4 Johns. Ch. 445.

78. *Williams v. Lindblom*, 68 Hun

been guilty of negligence in not keeping proper accounts and has misappropriated part of the trust funds, he may be charged with the costs of the suit.⁷⁹

In a proper case, an additional allowance of costs may be made under section 1513 of the Civil Practice Act.⁸⁰ Or, the court, in its discretion may deny an application for an extra allowance.⁸¹ The granting of such costs being a matter of discretion, the Court of Appeals will not interfere, provided there was sufficient evidence before the trial court to justify an exercise of its discretionary power.⁸²

173, 22 N. Y. Supp. 678, 52 St. Rep. 78, affirmed on opinion below, 142 N. Y. 682.

79. *Spencer v. Spencer*, 11 Paige 299.

80. *Woodbridge v. First Nat. Bank*, 45 App. Div. 166, 61 N. Y. Supp. 258, affirmed, 166 N. Y. 238; *Clark v. Gil-*

more, 149 App. Div. 445, 133 N. Y. Supp. 1047.

81. *Cohen v. Elias*, 176 App. Div. 763, 163 N. Y. Supp. 1051.

82. *Darling v. Brewster*, 55 N. Y. 667; *Woodbridge v. First Nat. Bank*, 166 N. Y. 238.

INJUNCTION.

ARTICLE I.

Introductory.

PAGE

A. Nature of action.....	104
B. Jurisdiction of courts.....	105
C. Adequacy of other remedies.....	106
D. Necessity for remedy; irreparable damage.....	108
E. Discretion	109

ARTICLE II.

Enforcement of Contracts.

A. In general	112
B. Analogy to specific performance of contracts.....	114
C. Uncertainty of contract.....	116
D. Inequity; mutuality	116
E. Contract terminated before trial.....	117
F. Performance by plaintiff.....	118
G. Contract for personal service.....	118
1. In general	118
2. Services within rule.....	121
3. Actors, actresses, etc.....	123
4. Athletes	124
5. Necessity of negative covenant.....	125
6. Effect of stipulated damages.....	125
7. Contract illegal, inequitable, lacking mutuality.....	126
8. Performance by plaintiff.....	126
9. Competitor as party defendant.....	127
10. Action by employee.....	127
H. Contract regulating conduct of employee after termination of employment	128
1. In general	128
2. Divulgence of trade secrets.....	129
3. Soliciting customers of former employer; mailing lists.....	131
4. Agreement not to start competing business.....	133
I. Contract against competition on sale of business.....	134
1. General rule	134
2. Reasonableness of restriction.....	136
3. Monopoly	136
4. Damages	136
5. Provision in contract for stipulated damages.....	137
6. What constitutes a violation.....	137
7. By whom enforced.....	138
J. Restrictive covenant as to use of property.....	139
1. In general	139
2. Mandatory injunction for removal of structure.....	140
3. Oral or implied restrictions.....	141
4. General construction of covenants.....	142

	PAGE
5. Necessity of damage to plaintiff.....	143
6. Stipulated damages in lieu of injunction.....	144
7. Lack of uniformity in development.....	144
8. Effect of changed conditions.....	145
9. Effect of violation by plaintiff.....	147
10. Effect of violations by others.....	148
11. Release or waiver of covenant.....	148
12. Acquiescence of plaintiff; waiver; laches.....	149
13. By whom enforced.....	150
14. Against whom enforced.....	151
15. Dwellings only.....	152
16. Private dwellings only.....	153
17. All structures forbidden.....	154
18. Offensive business.....	155
19. Apartment houses.....	156
20. Distance of structure from street line.....	156
21. Barns; stables; garages.....	157
K. Leases.....	157
1. In general.....	157
2. Enjoyment of premises by tenant.....	158
3. Use by landlord of part of premises not leased.....	160
4. Improper use of premises by tenant.....	160
5. Assignment of lease or subletting by tenant.....	161
6. Damage to freehold by tenant.....	161
L. Negotiable instruments.....	162
M. Sales.....	163
N. Advertising contracts.....	164
O. Conditions in grant or contract.....	165
P. Municipal contracts.....	166

ARTICLE III.

Protection of Property Rights.

A. Trespass.....	166
1. In general.....	166
2. Mines; quarries; sand banks.....	169
3. Timber.....	170
4. Encroachment.....	170
5. Deposit of materials on private premises.....	172
6. Dumping of sewerage.....	172
7. Construction of railroad on private property.....	173
8. Beach.....	173
9. Roof.....	174
10. Trespass by animals.....	174
11. Damage to personal property.....	174
12. Title of plaintiff.....	175
13. Necessity of establishing title at law.....	175
B. Waste.....	175
C. Nuisance.....	177

	PAGE
D. Spite fences	177
E. Blasting	178
F. Easements	178
1. In general	178
2. Right of way	179
3. Light, air and view	179
4. Sewerage, pipe lines	180
5. Bill board	180
6. Party wall	180
7. Unauthorized use of easement	181
8. Illegal attempt to assert easement	181
G. Licenses	181
H. Lateral support	182
I. Streets and highways	182
1. Obstructions	182
2. Encroachments	184
3. Railroads	185
4. Street railways	187
5. Elevated railroads	189
6. Subways	192
7. Underground conduits	193
8. Telephone and telegraph lines	193
9. Bridges	193
10. Laying out or improvement of highways	194
11. Cutting trees	195
12. Damage to highway	195
J. Waters and watercourses	196
1. In general	196
2. Diversion	197
3. Pollution	200
4. Dams; flooding	203
5. Artificial drainage of surface waters	206
6. Obstruction to navigation	207
7. Subterranean waters; springs	208
8. Lakes and ponds	208
9. Ice	209
10. Oyster beds	210
K. Protection from illegal tax	211
1. In general	211
2. Illegal assessment	212
3. Execution of illegal tax deeds	212
4. Local assessments	213
L. Equity of redemption	214
1. Statutory foreclosure of real estate mortgage	214
2. Chattel mortgage	215
3. Pledge	217
M. Municipal permits and licenses	217



INJUNCTION.

101

ARTICLE IV.

Enforcement of Corporate Duties.

	PAGE
A. Municipal corporations	218
1. In general	218
2. Taxpayers' actions	219
3. Title to office	220
B. Public utility corporations	221
1. Service	221
2. Unreasonable rates	223
3. Confiscatory rates	224
C. Religious corporations	225
D. Membership corporations	226
E. Private corporations	227

ARTICLE V.

Judicial Proceedings.

A. In general	228
B. Action as substitute for appeal	232
C. Action as substitute for change of venue	233
D. Stay of proceedings contrasted	233
E. Restraint of equitable action	234
F. Multiplicity of suits	235
G. Proceedings in federal courts	237
H. Proceedings in courts of other states	238
I. Proceedings in foreign countries	241
J. Usurious obligation	241
K. Obligation settled	241
L. Counterclaim or set-off	243
M. Surrogate's courts	243
N. Inferior local courts	245
O. Ecclesiastical courts	245
P. Condemnation proceedings	246
Q. Summary proceedings	246
R. Ejectment	248
S. Enforcement of arbitration	248
T. Enforcement of judgment	249
U. Use of evidence improperly secured	250
V. Parties	251

ARTICLE VI.

Enforcement of Penal Laws: Ordinances.

A. Restraint of officials from enforcing laws	251
1. In general	251
2. Trespass by police officers	253
3. Sunday laws	255
4. Attack on illegal ordinances	255
5. Attack on unconstitutional statute	259
B. Injunction as remedy to enforce penal laws	259

ARTICLE VII.

Unfair Competition.

	PAGE
A. In general	262
B. Trade-marks and trade-names	263
1. Federal and state statutes	263
2. Property right in trade-marks	264
3. Transfer of trade-mark	264
4. Abandonment of trade-mark	265
5. What constitutes an infringement	265
6. Products not competitive	267
7. Injunction as appropriate remedy for infringement	268
8. Absence of intention to infringe	269
9. Name as trade-mark	270
10. Right to use one's own name	273
11. Similarity of corporate names	275
12. Labels and wrappers	277
13. Color schemes	278
14. Fraudulent business not protected	278
15. Laches	279
16. Damages	279
17. Parties	280
18. Circulars, etc., claiming ownership of trade-mark	281
C. Patents	281
D. Literary property	282
E. Monopolies	284
F. Public utility operating without necessary preliminaries	285
G. Exclusiveness of franchise	286

ARTICLE VIII.

Labor Unions, Strikes, Boycotts, etc.

A. Strike	287
B. Injury to employer's property	289
C. Breach of contract	289
D. Interference with workmen	290
E. Picketing	291
F. Boycott	294
G. Responsibility of union	295
H. Injury must be anticipated	296

ARTICLE IX.

Protection of Civil Rights.

A. Right of privacy	297
1. Civil Rights Law, § 50, right of privacy	297
2. Civil Rights Law, § 51, action for injunction and for damages	297
3. Constitutionality of statute	297
4. Rule prior to enactment of statute	297
5. Application of statute	298
6. Oral consent; estoppel	299
7. Damages	300

	PAGE
B. Libel and slander.....	300
C. Burial rights	301
D. Interference with mail.....	302
E. Exclusion from public place.....	302
F. Matrimonial status	302

ARTICLE X.

Procedure.

A. Limitation of action; laches.....	303
B. Parties	304
1. Plaintiff	304
2. Necessary defendants	305
3. Proper defendants	306
4. Municipality	306
5. State of New York and its officials.....	307
C. Pleadings	307
1. Complaint	307
2. Joinder of causes of action.....	308
3. Answer	309
4. Form of complaint for trade-mark violation.....	309
5. Form of complaint for violation of building covenant.....	313
6. Form of complaint for trespass on timber lot.....	316
7. Form of complaint to restrain violation of ordinance.....	319
D. Preliminary injunctions	321
1. In general	321
2. Breach of contract.....	325
3. Trade-marks and trade-names.....	326
4. Labor unions; strikes; boycott, etc.....	326
5. Mandatory injunction	327
6. When granted pending appeal.....	328
7. Discretion of court.....	329
8. Complaint to state cause of action.....	329
9. Affidavits in support of complaint.....	330
10. Opposing affidavits, answer containing denials.....	331
11. Undertaking	332
12. Notice of application for order.....	332
13. Order granting preliminary injunction.....	333
14. Service of order.....	334
15. Enforcement of order.....	334
E. Trial of issues.....	336
F. Relief granted	337
1. Injunctive relief in general.....	337
2. Mandatory injunction	338
3. Damages in addition to injunctive relief.....	340
4. Legal relief in lieu of equitable relief.....	342
5. Postponement of operation of injunction.....	344
6. Enforcement of judgment.....	345
7. Form of judgment to restrain infringement of trade-name.....	346
8. Form of judgment to restrain violation of ordinance.....	347

	PAGE
G. Appeals	347
1. In general	347
2. Temporary injunctions	348
H. Costs	349

ARTICLE I.

INTRODUCTORY.

A. Nature of action.

An action for an injunction is one wherein the plaintiff seeks a judgment requiring the defendant to refrain from committing a certain act or acts. More broadly speaking, the action also includes those where mandatory injunctions are sought which in effect, compel the defendant to do a certain act. The action is clearly equitable in its nature. It is representative of a broad distinction between actions at law and actions in equity, whereas, a court of law only provides a redress for a wrong already sustained, but a court of equity seeks to prevent the doing of the wrong.¹ Although the Civil Practice Act, in words, states that there is but one form of civil action and that the distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished,² nevertheless, the distinction is so inherent in our judicial system, that such result is only partially accomplished. In order that a litigant can entitle himself to the equitable remedy of injunction, he must make a case, such as would, while law and equity were administered by different tribunals, have made an equitable cause of action.³ It was formerly a principle that injunctive relief would not be awarded to enforce a legal right until that right had first been established in a court of law; but since the union of law and equity in the same tribunal, the legal right may be established and the equitable remedy be obtained in the same action.⁴ Injunc-

1. *Daily v. New York*, 170 App. Div. 267, 156 N. Y. Supp. 124, affirmed without opinion, 218 N. Y. 665; *Green Island Ice Co. v. Norton*, 42 Misc. 238, 86 N. Y. Supp. 613, affirmed, 105 App. Div. 331, 94 N. Y. Supp. 1147, affirmed, 189 N. Y. 529; *Bouton v. City of*

Brooklyn and Briant, 7 How. Pr. 198, affirmed, 15 Barb. 375.

2. Civ. Prac. Act, §8.

3. *Troy etc. R. Co. v. Boston etc. R. Co.*, 86 N. Y. 107.

4. *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191; *Broiestedt v. South Side R. Co. of L. I.*, 55 N. Y. 220.

tive relief may be granted, not only in an action according to the well established forms, but also in an action under section 473 of the Civil Practice Act relating to declaratory judgments.⁵

B. Jurisdiction of courts.

The Supreme Court, succeeding to the equity powers of the Chancellor, has jurisdiction of actions of injunction.⁶ The county courts have no jurisdiction of the action,⁷ though, if an action is pending in the Supreme Court, a county judge may grant a temporary order of injunction.⁸

The action may be maintained in the Supreme Court by a resident or a domestic corporation, although the defendant is a non-resident or a foreign corporation.⁹ There are, however, some restrictions as to the use of the courts of this state for adjudicating the rights between two foreign corporations, or between a foreign corporation and a non-resident.¹⁰ A foreign corporation can secure an injunction in this State against a resident.¹¹ The fact that some of the acts were committed outside of the State does not deprive our courts of jurisdiction.¹² If the courts of this State have jurisdiction of the person, they may in a proper case restrain the performance of an act in another state.¹³ But when a judgment against a foreign corporation would not be effectual without the aid of the courts of a foreign country or of a sister state and it may contravene the public policy of the foreign jurisdiction or rest upon the construction of a foreign statute, the interpretation of which is not free from doubt—as where the subject-matter of the litigation and the judgment would relate strictly to the internal affairs and management of the foreign corporation—the court should decline jurisdiction because such questions are

5. *Craig v. Commissioners of Sinking Fund*, 203 App. Div. 412, 203 N. Y. Supp. 236.

6. *Bouton v. City of Brooklyn and Briant*, 7 How. Pr. 198, affirmed, 15 Barb. 375.

7. *Brown v. Quinlan*, 95 Misc. 95, 160 N. Y. Supp. 500.

8. Civ. Prac. Act, § 817. And see, *Aldinger v. Pugh*, 132 N. Y. 403.

9. *French v. Maguire*, 55 How. Pr. 471; *Moore v. New Jersey Lighterage*

Co., 57 Super Ct. (25 J. & S.) 1, 23 State Rep. 213, 5 N. Y. Supp. 192.

10. General Corporation Law, § 47.

11. *Direct U. S. Cable Co. v. Dom'n Tel. Co.*, 84 N. Y. 153, reversing, 22 Hun 568.

12. *Morris v. Alstedter*, 93 Misc. 329, 156 N. Y. Supp. 1103.

13. *Niagara Falls, etc. Bridge Co. v. Grand Trunk Ry. Co.*, 241 N. Y. 85; *French v. Maguire*, 55 How. Pr. 471.

of local administration.¹⁴ A court of equity should not restrain a party from doing an act, when it has no power to protect that party from being compelled by another court of competent jurisdiction to do the act thus prohibited.¹⁵

The Legislature may extend the right of injunction to cases in which heretofore such relief has been denied; and, on the other hand, may abridge the power of the courts by forbidding the courts to grant injunctions in certain cases,¹⁶ as by providing that a certain remedy shall be the exclusive remedy for a certain wrong.¹⁷

C. Adequacy of other remedies.

The foundation of equitable jurisdiction is the inability of the courts of law to furnish an adequate remedy for the protection of a plaintiff.¹⁸ If one has an adequate remedy at law, an injunction is not an appropriate remedy.¹⁹ An injunction will not be granted in a case where money damages will afford a complete remedy to the injured person.²⁰ The proper remedy to determine the title to office is an ac-

14. *Hallenborg v. Greene*, 66 App. Div. 590, 73 N. Y. Supp. 403; *Cuppy v. Ward*, 187 App. Div. 625, 176 N. Y. Supp. 233, affirmed, 227 N. Y. 603.

15. *Mahr v. Norwich Union F. Ins. Soc.*, 127 N. Y. 452.

16. *Lennon v. Mayor, etc., of N. Y.*, 55 N. Y. 361.

17. *Briggs v. Knickerbocker Ice Co.*, 11 Misc. 197, 65 St. Rep. 152, 32 N. Y. Supp. 95.

18. *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45.

19. *Savage v. Allen*, 54 N. Y. 458; *Thomas v. Musical Mut. Protective Union*, 121 N. Y. 45; *Fox v. Fitzpatrick*, 190 N. Y. 259; *Insurance Co. of Pennsylvania v. Park & Pollard Co.*, 190 App. Div. 388, 180 N. Y. Supp. 133, affirmed, 229 N. Y. 631; *Frey v. E. R. Sherbourne Co.*, 193 App. Div. 849, 184 N. Y. Supp. 661; *Briggs v. Knickerbocker Ice Co.*, 11 Misc. 197, 65 St. Rep. 152, 32 N. Y. Supp. 95; *Keating v. Fitch*, 14 Misc. 123, 70 St. Rep. 383, 35 N. Y. Supp. 641; *Schulz v. Albany*, 27 Misc. 51, 57 N. Y. Supp.

963, affirmed, 42 App. Div. 437, 59 N. Y. Supp. 235; *Syracuse Rapid Transit R. Co. v. Salt Springs Nat. Bank*, 28 Misc. 619, 59 N. Y. Supp. 1066; *Hackett v. Northern Pac. R. Co.*, 36 Misc. 583, 73 N. Y. Supp. 1087; *Manix v. Frost*, 100 Misc. 36, 164 N. Y. Supp. 1050, affirmed, 181 App. Div. 961, 168 N. Y. Supp. 1118; *Newcombe v. Irving National Bank*, 51 Hun 220, 4 N. Y. Supp. 37, 21 St. Rep. 323; *Brush Electric Illuminating Co. v. Consolidated Telegraph & Electrical Subway Co.*, 60 Hun 446, 39 St. Rep. 538, 15 N. Y. Supp. 477; *Gillilan v. Norton*, 29 Super. Ct. (6 Rob.) 546, 33 How. Pr. 373.

20. *Knickerbocker Ice Co. v. 42nd Street, etc. R. Co.*, 85 App. Div. 530, 83 N. Y. Supp. 469, affirmed, 176 N. Y. 408; *Raymond v. Transit Dec. Co.*, 65 Misc. 70, 119 N. Y. Supp. 655, affirmed, 134 App. Div. 981, 119 N. Y. Supp. 655; *Hackett v. Northern Pac. R. Co.*, 36 Misc. 583, 73 N. Y. Supp. 1087; *Thompson v. Matthews*, 2 Edw. Ch. 212; *Marshall v. Peters*, 12 How.

tion in the nature of *quo warranto* under article 75 of the Civil Practice Act, not an equitable action for an injunction.²¹ If one seeks to recover the possession of personal property, he should maintain an action of replevin.²² The proper form of action to vacate letters-patent granted by the State is under sections 138-139b of the Public Lands Law.²³

It is not enough that there be a remedy at law to prevent a court of equity from intervening, but there must be a plain and adequate remedy. It should on the whole be as practical and efficient as the remedy in equity; otherwise the latter may be applied.²⁴ The impossibility or extreme uncertainty of estimating the damages may render the legal remedy so unsatisfactory that equity will assume jurisdiction.²⁵ The fact that the plaintiff may have a remedy by motion, where the issues are determined upon *ex parte* affidavits, will not deprive equity of jurisdiction.²⁶

The fact that a penalty is annexed to a covenant to do or not do a particular act, does not of itself give the covenantor the option to perform or pay the penalty. He is bound to perform, unless it appears from the particular language, construed in the light of the surrounding circumstances, that it was the intention of the parties to make the penalty the price of non-performance, to be accepted by the covenantee in lieu thereof.²⁷ A provision in a contract for the sale of a business fixing a sum as liquidated damages in case of wrongful competition by the seller, does not preclude equitable relief, unless it appears that the clause as to liquidated damages was intended as to the sole remedy.²⁸

Pr. 218; *Balcom v. Julian*, 22 How. Pr. 349; *Crooke v. Brooklyn, T. & C. I. Ry. Co.*, 8 Week. Dig. 252.

21. *People v. Sampson*, 25 Barb. 254. And see, *infra*, IV-A-3, Title to office.

22. *Syracuse Rapid Transit Ry. Co. v. Salt Springs Nat. Bank*, 28 Misc. 619, 59 N. Y. Supp. 1066.

23. *People v. Steeplechase Park Co.*, 218 N. Y. 459.

24. *Daily v. New York*, 170 App. Div. 267, 156 N. Y. Supp. 124, affirmed without opinion, 218 N. Y. 665; *Funk v. Brooklyn Glass & Mfg. Co.*, 25 Misc. 91, 53 N. Y. Supp. 1086.

25. *Daily v. New York*, 170 App. Div. 267, 156 N. Y. Supp. 124, affirmed without opinion, 218 N. Y. 665; *Funk v. Brooklyn Glass & Mfg. Co.*, 25 Misc. 91, 53 N. Y. Supp. 1086; *Smith v. Gold & Stock Tel. Co.*, 42 Hun 454, 6 St. Rep. 110, 25 Week. Dig. 347.

26. *Buffum v. Forster*, 77 Hun 27, 59 St. Rep. 833, 28 N. Y. Supp. 285.

27. *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400.

28. *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Zimmerman v. Gerzog*, 13 App. Div. 210, 43 N. Y. Supp. 339.

D. Necessity for remedy; irreparable damage.

Equity will not extend a remedy by way of injunction unless necessary for the protection of the plaintiff's rights.²⁹ It will not interfere unless otherwise irreparable damage will result.³⁰ If a property right has clearly been violated, or is about to be violated, no large amount of damages is necessary.³¹ Nominal damages are sufficient where the defendant's acts may in the course of time create an easement by prescription.³² The plaintiff is not required to allege or prove the amount of damages,³³ but, in the absence of some damage, either sustained, or anticipated with reasonable certainty, an injunction will not be granted.³⁴ Injury, material and actual, not fanciful or theoretical or merely possible, must be shown as the necessary or probable result of the action sought to be restrained.³⁵

29. *Savage v. Allen*, 54 N. Y. 458; *Raymond v. Transit Dec. Co.*, 65 Misc. 70, 119 N. Y. Supp. 655, affirmed, 134 App. Div. 981, 119 N. Y. Supp. 655; *Watson v. New York etc., R. Co.*, 64 How. Pr. 220, affirmed, 30 Hun 649.

30. *Savage v. Allen*, 54 N. Y. 458; *Thomas v. Musical Mutual Protective Union*, 121 N. Y. 45; *Reynolds v. Everett*, 144 N. Y. 189; *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347; *New Hartford Canning Co. v. Bulifant*, 78 App. Div. 6, 78 N. Y. Supp. 951; *Strobridge Lithographing Co. v. Crane*, 35 St. Rep. 473; *Purdy v. Manhattan Elev. Ry. Co.*, 36 St. Rep. 43, 13 N. Y. Supp. 295.

31. *Whalen v. Union Bag & Paper Co.*, 208 N. Y. 1; *Ackerman v. True*, 71 App. Div. 143, 75 N. Y. Supp. 695, reversed on other grounds, 175 N. Y. 353; *Smith v. City of Rochester*, 38 Hun 612, affirmed without opinion, 104 N. Y. 674; *Davies v. Racer*, 72 Hun 43, 25 N. Y. Supp. 293, 55 St. Rep. 191.

32. *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278; *Western New York Water Co. v. Niagara Falls*, 91 Misc. 73, 154 N. Y. Supp. 1046, affirmed, 176 App. Div. 944, 162 N. Y. Supp. 1149.

33. *Andrews v. Cohen*, 221 N. Y. 148; *Castle v. Bell Tel. Co.*, 30 Misc. 38, 61

N. Y. Supp. 743, affirmed 49 App. Div. 437, 63 N. Y. Supp. 482; *Townsend v. Bell*, 62 Hun 306, 42 St. Rep. 229, 17 N. Y. Supp. 210; *William P. Greiner Bldg. Corp. v. Cheektowage*, 181 N. Y. Supp. 759.

34. *Platt v. Jones*, 96 N. Y. 24; *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347; *Wormser v. Brown*, 149 N. Y. 163; *Hoffman v. Manhattan El. R. Co.*, 1 Misc. 155, 20 N. Y. Supp. 625; *Castle v. Bell Tel. Co.*, 30 Misc. 38, 61 N. Y. Supp. 743, affirmed, 49 App. Div. 437, 63 N. Y. Supp. 482; *Powlowski v. Mohawk Golf Course*, 119 Misc. 139, 195 N. Y. Supp. 788, modified, 204 App. Div. 200, 198 N. Y. Supp. 30; *Cooperstone v. Brooklyn Edison Co., Inc.*, 128 Misc. 216, 219 N. Y. Supp. 11; *Crooke v. Flatbush Waterworks Co.*, 27 Hun 72; *Brush v. Manhattan Ry. Co.*, 44 St. Rep. 111, 17 N. Y. Supp. 540; *Neiman v. Butler*, 46 St. Rep. 928, 19 N. Y. Supp. 403; *Bloomington v. Sherman*, 19 Week. Dig. 30.

A waiver of damages does not affect the equitable jurisdiction of the court. *Cooley v. Cummings*, 16 St. Rep. 947, 1 N. Y. Supp. 631.

35. *People v. Canal Board*, 55 N. Y. 390; *Genet v. Delaware, etc. Canal Co.*, 122 N. Y. 505; *Wormser v. Brown*, 149

A court of equity will not interfere by injunction to prevent a defendant from doing acts which, so far as appears, he has not threatened to do or claimed the right to do.³⁶ The commission of past acts does not justify injunctive relief, unless there is a reasonable apprehension of a repetition.³⁷ Mere threats, unaccompanied by acts, do not warrant the extraordinary remedy of injunction.³⁸ But, where a public officer, by the order of a superior authority, the regularity of which it is not his business to investigate and which it is his official duty to obey, has been commanded to do an illegal act, the fact that he has not threatened to do such act is no bar to the maintenance of an action restraining its commission.³⁹

E. Discretion.

The right to injunctive relief is not absolute, but, in the discretion of the court, the remedy may be withheld, although the plaintiff's rights have been infringed.⁴⁰ This

N. Y. 163; *Raymond v. Transit Dev. Co.*, 65 Misc. 70, 119 N. Y. Supp. 655, affirmed, 134 App. Div. 981, 119 N. Y. Supp. 655; *Purdy v. Manhattan Elevated R. Co.*, 36 St. Rep. 43, 13 N. Y. Supp. 295; *Neeman v. Butler*, 46 St. Rep. 928, 19 N. Y. Supp. 403.

36. *Griffith v. Dodgson*, 103 App. Div. 542, 93 N. Y. Supp. 155; *Mariposa Co. v. Garrison*, 26 How. Pr. 448.

37. *Reynolds v. Everett*, 144 N. Y. 189.

38. *Griffin v. Winne*, 10 Hun 571, affirmed on opinion below, 79 N. Y. 637.

39. *Williams v. Boynton*, 147 N. Y. 426; *Daily v. New York*, 170 App. Div. 267, 156 N. Y. Supp. 124, affirmed without opinion, 219 N. Y. 665.

40. *Savage v. Allen*, 54 N. Y. 458; *Campbell v. Seaman*, 63 N. Y. 568; *Troy etc., R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 107; *Gray v. Manhattan R. Co.*, 128 N. Y. 499; *Reynolds v. Everett*, 144 N. Y. 189; *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347; *Wormser v. Brown*, 149 N. Y. 163; *McClure v. Leacroft*, 183 N. Y. 36; *Knoth*

v. Manhattan R. Co., 187 N. Y. 243; *McCann v. Chasm Power Co.*, 211 N. Y. 301; *Oswego & S. R. Co. v. State*, 226 N. Y. 351; *New York, O. & W. R. Co. v. Griffin*, 235 N. Y. 174; *Drabinsky v. Seagate Ass'n*, 239 N. Y. 321; *Forstmann v. Joray Holding Co.*, 244 N. Y. 22; *Mahler Co. v. Mahler*, 160 App. Div. 548, 145 N. Y. Supp. 764; *Thompson v. Ft. Miller Pulp, etc., Co.*, 195 App. Div. 271, 186 N. Y. Supp. 817; *Leonard v. Hotel Majestic*, 17 Misc. 229, 40 N. Y. Supp. 1044; *Hutchinson v. Skinner*, 21 Misc. 729, 49 N. Y. Supp. 360; *Matter of Bridgford*, 65 Hun 227, 47 St. Rep. 675, 20 N. Y. Supp. 281; *Dexter v. Beard*, 25 St. Rep. 664, 7 N. Y. Supp. 11, affirmed, 130 N. Y. 549.

A complaint is not insufficient merely because the court may in its discretion decline to award injunctive relief. *Butterick Pub. Co. v. Loeser & Co.*, 232 N. Y. 86.

Stipulation as to injunctive relief.—The issuance of an injunction being within the discretion of the court, it is of no importance that the parties

may not be done capriciously or arbitrarily, but only in the sound exercise of discretion, when the circumstances justify such action as in the interests of justice or the public welfare.⁴¹ It is a judicial discretion which follows well-regulated equity principles and precedents.⁴² Whether a court of equity should exercise its power in granting an injunction depends upon the facts peculiar to each case, and the benefits and injuries accruing.⁴³ An injunction will not be granted when it will operate inequitably or contrary to the real justice of the case.⁴⁴ If the allowance of an injunction would operate oppressively on the defendant, with no corresponding substantial benefit to the plaintiff, the court may deny such relief, and relegate the plaintiff to an action for his damages.⁴⁵ An equity court is not bound to issue an injunction when it will produce great public or private mischief merely for the purpose of protecting a technical or unsubstantial right.⁴⁶ Yet the size of the de-

have stipulated that such relief may be granted under certain circumstances. *Dockstader v. Reed*, 121 App. Div. 846, 106 N. Y. Supp. 795.

41. *Campbell v. Seaman*, 63 N. Y. 568; *Pond v. Harwood*, 139 N. Y. 111.

42. *Davis v. Lambertson*, 56 Barb. 480; *Dexter v. Beard*, 25 St. Rep. 664, 7 N. Y. Supp. 11, affirmed, 130 N. Y. 549.

43. *New York, O. & W. R. Co. v. Griffin*, 235 N. Y. 174; *Mahler Co. v. Mahler*, 160 App. Div. 548, 145 N. Y. Supp. 764; *Hutchinson v. Skinner*, 21 Misc. 729, 49 N. Y. Supp. 360; *Castle v. Bell Tel. Co.*, 30 Misc. 38, 61 N. Y. Supp. 743, affirmed, 49 App. Div. 437, 63 N. Y. Supp. 482.

44. *Troy etc. R. Co. v. Boston etc. R. Co.*, 86 N. Y. 107; *Gray v. Manhattan Ry. Co.*, 128 N. Y. 499; *Mott v. Underwood*, 148 N. Y. 463; *McClure v. Leacroft*, 183 N. Y. 36; *McCann v. Chasm Power Co.*, 211 N. Y. 301; *McSorley v. Gomprecht*, 30 Abb. N. C. 412, 26 N. Y. Supp. 917.

45. *Campbell v. Seaman*, 63 N. Y. 568; *McClure v. Leacroft*, 183 N. Y. 36; *McCann v. Chasm Power Co.*, 211 N. Y. 301; *Andrews v. Cohen*, 221 N.

Y. 148; *Forstmann v. Joray Holding Co.*, 244 N. Y. 22; *Loukes v. Payne*, 140 App. Div. 776, 125 N. Y. Supp. 850; *Leonard v. Hotel Majestic*, 17 Misc. 229, 40 N. Y. Supp. 1044; *Powlowski v. Mohawk Golf Club*, 119 Misc. 139, 195 N. Y. Supp. 788, modified, 204 App. Div. 200, 198 N. Y. Supp. 30; *McSorley v. Gomprecht*, 30 Abb. N. C. 412, 26 N. Y. Supp. 917.

46. *Gray v. Manhattan Ry. Co.*, 128 N. Y. 499; *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347; *Wormser v. Brown*, 149 N. Y. 163; *Andrews v. Cohen*, 221 N. Y. 148; *McCann v. Chasm Power Co.*, 211 N. Y. 301; *Warren v. City of Gloversville*, 81 App. Div. 291, 80 N. Y. Supp. 912; *Stillman v. Olean*, 184 App. Div. 323, 171 N. Y. Supp. 445, reversed on other grounds, 228 N. Y. 322; *Hoffman v. Manhattan El. R. Co.*, 1 Misc. 155, 20 N. Y. Supp. 625; *Castle v. Bell Tel. Co.*, 30 Misc. 38, 61 N. Y. Supp. 743, affirmed, 49 App. Div. 437, 63 N. Y. Supp. 482; *Raymond v. Transit Dev. Co.*, 65 Misc. 70, 119 N. Y. Supp. 655, affirmed, 134 App. Div. 981, 119 N. Y. Supp. 655; *Neiman v. Butler*, 46 St. Rep. 928, 19 N. Y. Supp. 403.

fendant's business does not exempt it from the operation of an injunction, for a small business is entitled to equitable protection as against an infringement of its rights by a larger organization.⁴⁷ It is, however, as a general rule, only those persons who have acted in good faith that receive the indulgence of the court.⁴⁸

The public welfare is to be considered; and, if the injunction sought would prejudice the interests of the public, as by interfering with a public improvement, an important public utility, or a necessary means of transportation, or would endanger the public health, the injunction may reasonably be refused or delayed; and, in lieu of the extraordinary remedy of injunction, redress in the form of damages may be permitted.⁴⁹ Where a great public improvement is challenged because it wrongfully injures the property rights of another, injunctive relief will not be granted, but in lieu

47. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Whalen v. Union Bag & Paper Co.*, 208 N. Y. 1; *Warren v. City of Gloversville*, 81 App. Div. 291, 80 N. Y. Supp. 912. "While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule every man must so use his own property as not to injure that of his neighbor, and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land, does not change the rule nor permit him to permanently prevent a material portion of the water of a natural stream from flowing over the land of a lower riparian owner, or to so pollute the rest of the stream as to render it unfit for ordinary use." *Strobel v. Kerr Salt Co.*, 164 N. Y. 303.

48. *Andrews v. Cohen*, 22 N. Y. 148.

49. *Troy, etc. R. Co. v. Boston, etc. R. Co.*, 86 N. Y. 107; *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347; *Jones v. Delaware L. & W. R. Co.*, 208 N. Y. 40; *McCann v. Chasm Power Co.*, 211 N. Y. 301; *New York, O. & W. R. Co. v. Griffin*, 235 N. Y. 174; *March v. New York*, 69 App. Div. 1, 74 N. Y. Supp. 630; *Schwarzenbach v. Oneonta Light etc. Co.*, 144 App. Div. 384, 129 N. Y. Supp. 384, modified on other grounds, 207 N. Y. 671; *Keating v. Fitch*, 14 Misc. 128, 70 St. Rep. 383, 35 N. Y. Supp. 641; *Castle v. Bell Tel. Co.*, 30 Misc. 38, 61 N. Y. Supp. 743, affirmed, 49 App. Div. 437, 63 N. Y. Supp. 482; *Rider v. City of Amsterdam*, 31 Misc. 375, 65 N. Y. Supp. 579; *Mount Morris Bk. v. N. Y. & Harlem R. R. Co.*, 50 Misc. 417, 100 N. Y. Supp. 544; *Raymond v. Transit Dev. Co.*, 65 Misc. 70, 119 N. Y. Supp. 655, affirmed, 134 App. Div. 981, 119 N. Y. Supp. 655; *Gottlieb v. Matchkin*, 117 Misc. 128, 191 N. Y. Supp. 777; *Hentz v. Long Island R. Co.*, 13 Barb. 646; *Hodgkinson v. Long Island R. Co.*, 4 Edw. Ch. 411; *Vick v. City of Rochester*, 46 Hun 607, 13 St. Rep. 31.

thereof the plaintiff's damages will be determined and allowed.⁵⁰

Laches or acquiescence on the part of a plaintiff, although not constituting a defense to the action, may be considered as a circumstance affecting the discretion of the court.⁵¹

ARTICLE II.

ENFORCEMENT OF CONTRACTS.

A. In general.

It may be stated as a general rule that it is not the province of a court of equity to enjoin an anticipated violation of a contract obligation.⁵² The remedy in an action at law for damages is usually deemed an adequate remedy, and hence the general principle—that equity will not assume jurisdiction if there exists an adequate remedy at law—is applied.⁵³ One should not be deprived of his right to have damages fixed by a jury, unless the case is one of equitable cognizance.⁵⁴

The general rule, however, is subject to exceptions. The absence of an adequate remedy at law will induce a court of equity to assume jurisdiction of a controversy, although a contract obligation is involved.⁵⁵ Where the damage re-

50. See, *infra*, X-F-4, Relief granted—Legal relief in lieu of equitable relief.

51. *Knoth v. Manhattan R. Co.*, 187 N. Y. 243; *McSorley v. Gomprecht*, 30 Abb. N. C. 412, 26 N. Y. Supp. 917.

52. *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312; *Close v. Flesher*, 8 Misc. 299, 28 N. Y. Supp. 737.

53. *Hogel v. Warner*, 59 N. Y. Supp. 786; *Fox v. Fitzpatrick*, 190 N. Y. 259; *Hess v. Roberts*, 124 App. Div. 328, 108 N. Y. Supp. 894; *Close v. Flesher*, 8 Misc. 299, 28 N. Y. Supp. 737.

Separation agreement.—Injunction to restrain the violation by a husband of a separation agreement, was denied in *Winburn v. Winburn*, 200 App. Div. 26, 192 N. Y. Supp. 280.

54. *Fox v. Fitzpatrick*, 190 N. Y. 259.

55. *S. C. Posner Co. v. Jackson*, 223 N. Y. 325; *Gardiner v. The Roycrofters*, 134 App. Div. 45, 118 N. Y. Supp. 703, affirmed, 197 N. Y. 511; *Pabst Brewing Co. v. Sloane*, 155 App. Div. 580, 140 N. Y. Supp. 858; *Dailey v. New York*, 170 App. Div. 267, 156 N. Y. Supp. 124, affirmed without opinion, 218 N. Y. 665; *Niagara Falls Hydraulic Power Co. v. Pettibone-Cataract Paper Co.*, 198 App. Div. 644, 191 N. Y. Supp. 12; *Fradus Contracting Co. v. Taylor*, 201 App. Div. 298, 194 N. Y. Supp. 286; *Bergen Beach Land Corp. v. New York*, 108 Misc. 70, 177 N. Y. Supp. 439, affirmed, 192 App. Div. 884, 181 N. Y. Supp. 773; *Niagara Falls International Bridge Co. v. Great Western Ry. Co.*, 39 Barb. 212; *House v. Clemens*, 16 Daly 3, 9 N. Y. Supp. 484.

Tunnel.—In actions to enjoin the defendants from interfering with the

sulting from a breach of contract cannot be adequately determined, or if there is great uncertainty as to its amount, a

construction of a tunnel and ap-purtenances along the bank of the Niagara river for the purpose of collecting the water discharged by the mills adjacent thereto, it appeared that the plaintiff and defendants, each of whom maintained plants for the generation of electric power along the river, entered into contracts settling existing controversies between them and providing for the construction of the tunnel at a future date and binding their successors and assigns; that nearly fifteen years after the delivery of the contracts (the plaintiff's predecessor having been merged into the plaintiff) written notice was served on the defendants by the plaintiff, outlining its purpose to construct the tunnel and submitting a sketch. At this point the defendants adopted a policy of antagonism to the work, and repudiated the contracts by refusing to join an engineering conference provided for by the contracts. **Held**, that the actions are not actions for specific performance, since the judgments awarded do not contain any mandatory or directory provisions. *Niagara Falls Hydraulic Power Co. v. Pettebone-Cataract Paper Co.*, 198 App. Div. 644, 191 N. Y. Supp. 12.

Water power.—A covenant in a deed whereby the grantor, owning a mill with water power, agreed to furnish the grantees of lands adjacent thereto with power to propel machinery in buildings to be erected on the premises conveyed runs with the land; it is not a personal covenant of the grantor. The covenant was for the benefit of the estate conveyed and created an easement imposed on the property of the grantor which inured not only to the immediate grantees but to their successors in title. Where after the conveyances the grantor at its own expense erected cables to transmit

power to the premises of the grantees there was a practical construction of the covenant by the original parties, and it showed that it was not intended that the grantees should go to the premises of the grantor for power, but rather that the grantor should erect such apparatus as was necessary to convey power to the grantees. Hence, where a purchaser of the grantor's title repudiated the covenant and refused to continue to furnish power and the means of conveying the same became defective, the grantees, or their successors, are entitled to a mandatory injunction requiring the grantor's successor to convey power to their premises. *Miller v. Clary*, 147 App. Div. 255.

Organized baseball.—The Supreme Court has jurisdiction of the subject of an action brought by certain baseball clubs, members of a voluntary unincorporated association known as the National League and formed under an agreement executed by the plaintiffs and certain other baseball clubs defendant, to prevent the latter from violating the agreement, to avoid an alleged illegal election by them of still another defendant as president-secretary-treasurer of the league, to restrain him from acting as such as well as from taking possession of the funds of the league and to prevent its alleged legal president from surrendering them to him, to the injury of the plaintiffs. *Boston Baseball Assn. v. Brooklyn Baseball Club*, 37 Misc. 521, 75 N. Y. Supp. 1076.

Partnership agreement.—Where certain employees of a co-partnership cooperate with one partner in his efforts to perpetrate a fraud upon the other partners, with full knowledge on the part of such employees, that such was the intent of such partner, and that it was all to be done in order that

court of equity may restrain a threatened violation.⁵⁶ Injunctive relief will not be granted unless the injury liable to result from non-enforcement of the contract is actual and material.⁵⁷

Negative covenants are frequently enforced by injunction.⁵⁸ A court of equity is more willing to restrain a contracting party from doing that which he has agreed not to do, than to restrain from refusing not to do that which he has promised to do. Thus restrictive covenants as to the use of the premises or as to the structures which shall be erected thereon, are enforced.⁵⁹ Likewise, covenants made upon the sale of a business binding the seller not to engage in a similar business within a certain territory, are of equitable cognizance.⁶⁰ So, too, an injunction may be granted, in a proper case, restraining one from divulging trade secrets.⁶¹ Through an injunction, a court may require a public utility to furnish service to a person entitled thereto.⁶²

B. Analogy to specific performance of contracts.

The equitable remedy to which recourse is generally had for the enforcement of a contract obligation is Specific Performance.⁶³ The distinction between the enforcement of a

such employees, as well as such partner, should profit at the expense of the co-partnership, the court has the power to restrain both the employees and the partner from either further proceeding with or consummating such illegal scheme, and such employees are likewise chargeable with the damages sustained by such co-partnership by reason of the partner's misconduct. *Baldwin v. Von Micheroux*, 83 Hun 43, 31 N. Y. Supp. 696.

Insurance contracts.—*World Mutual L. Ins. Co. v. Bund "Hand in Hand,"* 47 How. Pr. 32.

^{56.} *Daily v. New York*, 170 App. Div. 267, 156 N. Y. Supp. 124, affirmed without opinion, 218 N. Y. 665; *Fradus Contracting Co. v. Taylor*, 201 App. Div. 298, 194 N. Y. Supp. 286; *Bergen Beach Land Corp. v. New York City*, 108 Misc. 70, 177 N. Y. Supp. 439, affirmed, 192 App. Div. 984, 181 N. Y. Supp. 773.

^{57.} *Brown v. Britton*, 41 App. Div. 57, 58 N. Y. Supp. 353.

^{58.} *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Posner Co. v. Jackson*, 223 N. Y. 325; *Butterick Pub. Co. v. Frederick Loeser & Co.*, 232 N. Y. 86; *Lawrence v. Dixey*, 119 App. Div. 295, 104 N. Y. Supp. 517; *Pabst Brewing Co. v. Sloane*, 155 App. Div. 580, 140 N. Y. Supp. 858; *Ebsary Fireproofing & G. Co. v. Empire Gypsum Co.*, 110 Misc. 272, 181 N. Y. Supp. 270; *Toff Protectograph Co. v. Hirschberg*, 100 Misc. 418, 165 N. Y. Supp. 906.

^{59.} See, *infra*, II-J, Restrictive covenant as to use of property.

^{60.} See, *infra*, II-I, Contract against competition on sale of business.

^{61.} See, *infra*, II-H-2, Divulgence of trade secrets.

^{62.} See, *infra*, IV, Enforcement of corporate duties.

^{63.} See the Chapter on Specific Performance.

contract by means of a judgment directing a party to perform its covenants, and the enforcement of a judgment which enjoins him from violating its covenants, is shadowy. In many cases the distinction is merely a choice of language. The remedy by way of injunction is said to be "a negative specific performance."⁶⁴ "Every action for injunction against breach of contract necessarily embodies some suggestion paralleling specific performance."⁶⁵ The primary distinction is that the remedy of specific performance is available for the enforcement of affirmative agreements, while the injunctive remedy is used for the enforcement of negative covenants.⁶⁶

If a contract contains both affirmative and negative clauses, in a proper case, the affirmative provisions may be specifically enforced, and the negative covenants may be sustained by injunction. In some respects the courts exhibit more leniency to injunctive relief than to relief by way of specific performance. Thus, a contract may contain affirmative provisions which are so difficult of specific performance that the court will not undertake to impose that remedy, but at the same time the court may enjoin a violation of the negative covenants of the contract.⁶⁷ Thus, a contract for the services of an actor of unusual talents will not be specifically enforced, but the court may restrain him from serving a competing producer.⁶⁸ Likewise, in case of a contract between a manufacturer of goods and a retailer, whereby the retailer agrees to display and sell the manufacturer's product, the court may feel unable to supervise the specific performance of such covenants, yet if the contract restrains the retailer from selling similar products made by competing manufacturers, an injunction may be granted to retain the violation of this negative covenant.⁶⁹

If there are no negative covenants in the contract, and

64. *Fox v. Fitzpatrick*, 190 N. Y. 259.

65. *Niagara Falls Hydraulic Power Co. v. Pettibone-Cataract Paper Co.*, 198 App. Div. 644, 191 N. Y. Supp. 12.

66. *Clark Paper & Mfg. Co. v. Stenacher*, 108 Misc. 399, 177 N. Y. Supp. 614.

67. *Samuel Cupples Envelope Co. v. Lackner*, 99 App. Div. 231, 90 N. Y.

Supp. 954; *Niagara Falls Hydraulic Power Co. v. Pettibone-Cataract Paper Co.*, 198 App. Div. 644, 191 N. Y. Supp. 12.

68. See, *infra*, II-G, Contract for personal service.

69. *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60; *Butterick Pub. Co. v. Loeser & Co.*, 232 N. Y. 86.

the circumstances are such that specific performance, as such, cannot be awarded, the court will not grant equivalent relief in the form of an injunction.⁷⁰ In other words a litigant who, for some reason appealing to a court of equity, is not entitled to the specific performance of an affirmative clause in a contract, cannot secure equivalent relief by means of an injunction restraining a breach of the contract.⁷¹ Thus, an agreement to form a corporation will not be specifically enforced, and a party to such an agreement cannot secure an injunction to restrain the formation by the same parties of another corporation in which he does not participate.⁷²

C. Uncertainty of contract.

The court may exercise its discretion as to the granting of equitable relief by denying such relief when the contract is ambiguous or uncertain as to the matter under controversy.⁷³ This discretion, however, will not be exercised until a trial of the issues.⁷⁴ A contract which is indefinite as to time is incomplete, and will not be enforced by injunction.⁷⁵ A covenant which is indefinite as to what shall constitute a violation of it, will be enforced only so far as its meaning is not open to doubt.⁷⁶

D. Inequity; mutuality.

An injunction will not be granted to compel the performance of a contract, if the alleged contract is wanting in mutuality.⁷⁷ Thus, an injunction will not be granted to

70. *Perrin v. Smith*, 135 App. Div. 127, 119 N. Y. Supp. 990; *Davis v. Epoch Producing Corp.*, 91 Misc. 631, 155 N. Y. Supp. 597.

71. *Davis v. Epoch Producing Corp.*, 91 Misc. 631, 155 N. Y. Supp. 597.

72. *Perrin v. Smith*, 135 App. Div. 127, 119 N. Y. Supp. 990.

73. *Butterick Pub. Co. v. Loeser & Co.*, 232 N. Y. 86; *Arena, etc., Club v. McPartland*, 41 App. Div. 352, 58 N. Y. Supp. 477; *Sanford Dairy Co. v. Sanford*, 114 App. Div. 862, 100 N. Y. Supp. 270.

74. *Butterick Pub. Co. v. Loeser & Co.*, 232 N. Y. 86.

75. *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312.

76. *Sanford Dairy Co. v. Sanford*, 114 App. Div. 862, 100 N. Y. Supp. 270.

77. *Star Co. v. Press Pub. Co.*, 162 App. Div. 436, 147 N. Y. Supp. 579; *Brighton by the Sea v. Rivkin*, 201 App. Div. 726, 195 N. Y. Supp. 198; *Walcutt v. Gaskins*, 18 Misc. 118, 41 N. Y. Supp. 678; *American League Baseball Club v. Chase*, 86 Misc. 441, 149 N. Y. Supp. 6; *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. C. 419; *Woodward v. Harris*, 2 Barb. 439; *Shubert Theatrical Co. v. Coyne*, 115 N. Y. Supp. 968; *Davidson v. Dunham*, 152 N. Y. Supp. 16.

restrain the violation of a contract for personal services, where the employer is not bound by the contract to accept the services of the employee.⁷⁸ But an agreement does not necessarily lack mutuality because it does not contain express reciprocal promises, for these may be implied from the surrounding circumstances or the acts of the parties.⁷⁹

Equity will not enforce a contract which is unjust or oppressive, but will leave the parties to the remedy in an action at law.⁸⁰ The plaintiff must show that the contract is fair and reasonable.⁸¹ A contract which is illegal or against public policy will not be enforced.⁸² An infant will not be restrained from violating a contract for the rendering of personal services.⁸³ Equity will not lend its aid to enforce an agreement which is part of a general plan having for its object the maintenance of a monopoly and interference with the personal liberty of a citizen and the control of his free right to labor wherever and for whom he pleases.⁸⁴ The court will not grant an injunction to assist a company, engaged in the business of selling tips on horse races, in preventing its customers from reselling the tips to others at a lower price.⁸⁵

E. Contract terminated before trial.

A plaintiff who has terminated and cancelled a part of a contract cannot seek equitable relief for the enforcement

78. *Star Co. v. Press Pub. Co.*, 162 App. Div. 486, 147 N. Y. Supp. 579; *Walcutt v. Gaskins*, 18 Misc. 118, 41 N. Y. Supp. 678; *American League Baseball Club v. Chase*, 86 Misc. 441, 149 N. Y. Supp. 6; *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. C. 419.

79. *Meers v. Munsch-Frotzmann Co.*, 217 App. Div. 541, 217 N. Y. Supp. 256.

80. *Tolman v. Mulcahy*, 119 App. Div. 42, 103 N. Y. Supp. 936; *Mahler Co. v. Mahler*, 160 App. Div. 548, 145 N. Y. Supp. 764; *Gilbert v. Wilmer*, 102 Misc. 388, 168 N. Y. Supp. 1043; *Shubert Theatrical Co. v. Coyne*, 115 N. Y. Supp. 968; *Frees v. Parr*, 139 N. Y. Supp. 220.

81. *Shubert Theatrical Co. v. Coyne*, 115 N. Y. Supp. 968.

82. **Dramatic production.**—A court of equity will not compel a theatre owner to permit the production of a play which, on account of alleged immorality, has been condemned by the police authorities. *Liverright v. Waldorf Theatres Corp.*, 220 App. Div. 182, 221 N. Y. Supp. 194.

83. *Aborn v. Janis*, 62 Misc. 95, 113 N. Y. Supp. 309.

84. *American League Baseball Club v. Chase*, 86 Misc. 441, 149 N. Y. Supp. 6.

85. *Maxin & Gray Co. v. Sheehan*, 37 Misc. 368, 75 N. Y. Supp. 422.

of its remaining provisions.⁸⁶ If, during the pendency of the action, a contract has terminated by time limitation, an injunction will not be granted to restrain a violation thereof, but damages may be awarded in lieu of equitable relief.⁸⁷ If it appears that the plaintiff has sustained no substantial damage from the alleged breach of contract, the action may be dismissed.⁸⁸

F. Performance by plaintiff.

As a general rule one who has himself violated the terms of a contract cannot secure an injunction to restrain a violation by the other party.⁸⁹ Thus, if one has substantially violated a restrictive covenant as to the use of certain premises, he cannot enjoin a violation by his neighbor.⁹⁰ A dramatic producer who has not performed his contract with an actor, cannot restrain the actor from appearing for a rival producer.⁹¹

G. Contract for personal service.

1. In general.

As a general rule, an action at law for damages will afford an adequate remedy for the violation of a contract involving personal services, and hence an injunction will not issue to restrain a threatened breach of the contract.⁹² The situa-

86. *Northland Rubber Co. v. International Automobile League*, 143 N. Y. Supp. 1.

87. *Greenblatt v. Zimmerman*, 132 App. Div. 283, 117 N. Y. Supp. 18. See also, *Shubert v. Angeles*, 80 App. Div. 625, 80 N. Y. Supp. 146.

88. *Brown v. Britton*, 41 App. Div. 57, 58 N. Y. Supp. 353.

89. *Thorne v. French*, 4 Misc. 436, 24 N. Y. Supp. 694, affirmed, 143 N. Y. 679.

90. *Frees v. Parr*, 139 N. Y. Supp. 220. And see, *infra*, II-J-9, Restrictive covenant as to use of property.

91. *Pratt v. Montegriffo*, 25 Abb. N. C. 334, 32 St. Rep. 508, 10 N. Y. Supp. 903; *Hill v. Haberkorn*, 24 St. Rep. 756, 6 N. Y. Supp. 474.

92. *Kaumagraph Co. v. Stampagraph Co.*, 235 N. Y. 1; *Clark Paper*

& Mfg. Co. v. Stenacher, 236 N. Y. 312; *Dockstader v. Reed*, 121 App. Div. 846, 106 N. Y. Supp. 795; *Hammerstein v. Mann*, 137 App. Div. 580, 122 N. Y. Supp. 276; *Magid v. Tannenbaum*, 164 App. Div. 142, 149 N. Y. Supp. 445; *Walcutt v. Gaskins*, 18 Misc. 118, 41 N. Y. Supp. 678; *Carter v. Ferguson*, 58 Hun 569, 36 St. Rep. 1, 20 Civ. Proc. R. 21, 12 N. Y. Supp. 580; *Lasky Feature Play Co., Inc. v. Suratt etc., Film Corp.*, 154 N. Y. Supp. 974.

Employee restrained from continuance of employment.—A contract made through general agents or managers appointing a local insurance agent for five years may be revoked by the principal, and whether the revocation be right or wrong, the principal is entitled to enjoin the agent from continuing

tion, however, is different, if by reason of the circumstances or the peculiar nature of the services, an adequate remedy at law cannot be had. Equity, partially at least, assumes jurisdiction where the services are of a unique character, such as those of a famous stage performer, or of an unusually skillful athlete, or a person of rare mental power or artistic abilities.⁹³ Even in such a case, the court cannot compel the rendition of services. The difficulty of enforcement and of determining whether a breach has occurred, precludes such relief.⁹⁴ But, although unable to compel a spe-

the occupation. If the principal has been guilty of a breach of contract, the agent's remedy is an action for damages; he is not entitled to continue to act after revocation. *Star Fire Ins. Co. v. Ring*, 118 App. Div. 107, 103 N. Y. Supp. 137.

93. *Posner Co. v. Jackson*, 223 N. Y. 325; *Lawrence v. Dixey*, 119 App. Div. 295, 104 N. Y. Supp. 516; *Shubert Theatrical Co. v. Gallagher*, 206 App. Div. 514, 200 N. Y. Supp. 596; *Rogers Theatrical Enterprises, Inc. v. Comstock*, 225 App. Div. 34, 232 N. Y. Supp. 1; *Hammerstein v. Sylva*, 66 Misc. 550, 124 N. Y. Supp. 535; *Canary v. Russell*, 9 Misc. 558, 30 N. Y. Supp. 122; *Laskey Feature Play Co. v. Fox Vaudeville Co.*, 93 Misc. 364, 157 N. Y. Supp. 106, affirmed without opinion, 174 App. Div. 872, 159 N. Y. Supp. 1120; *Todd Protectograph Co. v. Hirschberg*, 100 Misc. 418, 165 N. Y. Supp. 906; *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. C. 419; *Pratt v. Montegriffo*, 25 Abb. N. C. 334, 32 St. Rep. 508, 10 N. Y. Supp. 903; *Daly v. Smith*, 38 Super. Ct. (6 J. & S.) 158, 49 How. Pr. 150; *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. Supp. 779, 24 Abb. N. Cas. 393; *Fredericks v. Mayer*, 13 How. Pr. 566; *Bronk v. Riley*, 50 Hun 489, 20 St. Rep. 401, 3 N. Y. Supp. 446; *Duff v. Russell*, 14 N. Y. Supp. 134, 39 St. Rep. 266, affirmed on opinion below, 133 N. Y. 678; *Hoyt v. Fuller*, 47 St. Rep. 504, 19 N. Y. Supp. 962.

Early cases.—In some of the earlier cases, it was held that injunctive relief would not be granted to restrain a violation of the negative covenants. *Hemblin v. Dinneford*, 2 Edw. Ch. 529; *Sanquirico v. Benedetti*, 1 Barb. 315.

94. *Lawrence v. Dixey*, 119 App. Div. 295, 104 N. Y. Supp. 516; *Walcutt v. Gaskins*, 18 Misc. 113, 41 N. Y. Supp. 678; *American League Baseball Club v. Chase*, 86 Misc. 441, 149 N. Y. Supp. 6; *Mapleson v. Del Puente*, 13 Abb. N. Cas. 144; *Pratt v. Montegriffo*, 25 Abb. N. C. 334, 32 St. Rep. 508, 10 N. Y. Supp. 903; *Sanquirico v. Benedetti*, 1 Barb. 315; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. Supp. 779, 24 Abb. N. Cas. 393; *DePol v. Sohlke*, 30 Super. Ct. (7 Rob.) 280. And see, the Chapter on Specific Performance.

Judicial humor as to specific performance.—"We have grave authority for the rule that 'the bird that can sing, and will not sing, must be made to sing' (old adage) Chancellor Walworth, in *DeRiva Finoli v. Corsetti*, 4 Paige 270. But the learned chancellor duly appreciated the difficulty of finding any officer of the Court of Chancery with that exquisite sensibility necessary to understand and enjoy with proper zest the peculiar beauties of Italian Opera, so that the singing of the defendant, under the direction and in the presence of the master in chancery, might afford a satisfactory

cific performance of the contract, much the same result may be accomplished by enjoining a violation of a provision in the contract not to work for a competitor.⁹⁵ That is to say, although the court feels powerless to enforce the affirmative covenants, it will enjoin a violation of the negative covenants.

The protection of trade secrets is also of equitable cognizance. Where in a contract of employment a servant agrees not to divulge any of the trade secrets he may learn in the course of his employment, this clause may be enforced by injunction.⁹⁶ A covenant by an employer that, upon the termination of the employment, he will not solicit the customers of the employer, may also be enforced by injunctive relief.⁹⁷

A contract for personal services cannot be assigned, and

test as to whether the engagement was duly performed, according to its spirit and intent. The lapse of sixty years has not so improved the courts of the State of New York, in this respect, that the substantial difficulty suggested by the chancellor has yet been obviated. It is not a matter of judicial knowledge to this court that any member of the bar might be appointed referee, or even any justice of this court could be chosen who could well perform such a task. It may be that after a judicial consultation some officer or judge might be designated who could tell the difference between *Casta Diva* and *The Star Spangled Banner*, or distinguish *Home Sweet Home* from *Yankee Doodle*. But the repertoire of the defendant, as I judge from the scope of the allegation of the plaintiffs' papers, is far wider in its range than the instances cited; and, if the plaintiffs should direct the defendant to sing an air from *Lohengrin*, or possibly a sacred hymn, the difficulty of choosing an expert judicial officer to test the performance might be insurmountable. Therefore, either by appreciation by the plaintiffs of the

obstacles in the way of affirmative performance of the contract, or by careful discrimination of the learned justice who allowed the judgment in this action, the judgment is confined to an injunction against the defendant from singing, and, however much critics may refine upon what is or what is not singing, it is fairly a matter of lawful presumption that it may be determined by auricular evidence whether or not an attempt is actually made to violate such injunction." *Walcutt v. Gaskins*, 18 Misc. 118, 41 N. Y. Supp. 678.

95. *Rogers Theatrical Enterprises, Inc. v. Comstock*, 225 App. Div. 34, 232 N. Y. Supp. 1; *Laskey Feature Play Co. v. Fox Vaudeville Co.*, 93 Misc. 364, 157 N. Y. Supp. 106, affirmed without opinion, 174 App. Div. 872, 159 N. Y. Supp. 1120; *Todd Protectograph Co. v. Hirschberg*, 100 Misc. 418, 165 N. Y. Supp. 906; *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. C. 419.

96. See, *infra*, II-H-2, Divulgence of trade secrets.

97. See, *infra*, II-H-3, Soliciting customers of former employer.

hence an action of this character cannot be maintained by the successor of the employer.⁹⁸

2. Services within rule.

In order to justify an injunction to restrain an employee from entering the employ of a competitor, it must appear that the services rendered by such employee are unique, special, or extraordinary.⁹⁹ If the services are not of this class, the employer is deemed to have an adequate remedy at law for any damages he may sustain.¹ A test of determining whether certain services are so unusual as to fall within the rule, is whether a substitute can be readily procured, and whether such substitute will substantially answer the purpose of the contract.² An employee who can readily be replaced may not be enjoined from working for another.³ If a satisfactory substitute has actually been secured before the controversy comes before the court, all doubts are thereby removed, and an injunction should not be granted.⁴ Or, if it appears that the employer has a large number of employees performing substantially the same duties, one of

98. *Avenue Z Wet Wash Laundry Co., Inc., v. Yarmush*, 129 Misc. 427, 221 N. Y. Supp. 506.

99. *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312; *Kessler v. Chappelle*, 73 App. Div. 447, 77 N. Y. Supp. 285; *Shubert Theatrical Co. v. Gallagher*, 200 App. Div. 596, 193 N. Y. Supp. 401; *Rogers Theatrical Enterprises v. Comstock*, 225 App. Div. 34, 232 N. Y. Supp. 1; *Universal Talking Machine Co. v. English*, 34 Misc. 342, 69 N. Y. Supp. 813; *American League Baseball Club v. Chase*, 86 Misc. 441, 149 N. Y. Supp. 6; *Gilbert v. Wilmer*, 102 Misc. 388, 168 N. Y. Supp. 1043; *Harry Hastings Attractions v. Howard*, 119 Misc. 326, 196 N. Y. Supp. 228; *Eldridge v. Milo*, 129 Misc. 666, 222 N. Y. Supp. 420; *Bronk v. Riley*, 50 Hun 459, 3 N. Y. Supp. 446, 20 St. Rep. 401; *Carter v. Ferguson*, 58 Hun 569, 36 St. Rep. 1, 20 Civ. Proc. 21, 12 N. Y. Supp. 580; *Laskey Feature Play Co. v. Suratt, & F. Film*

Corp., 154 N. Y. Supp. 974; *Strobridge Lithographing Co. v. Crane*, 35 St. Rep. 473; *Hoyt v. Fuller*, 47 St. Rep. 504, 19 N. Y. Supp. 962.

An indenture of apprenticeship was not enforced by specific performance or injunction. *Thomas v. Baird*, 47 Misc. 412, 94 N. Y. Supp. 47.

1. *Carter v. Ferguson*, 58 Hun 569, 36 St. Rep. 1, 20 Civ. Proc. 21, 12 N. Y. Supp. 580.

2. *Dockstader v. Reed*, 121 App. Div. 846, 106 N. Y. Supp. 795; *Mapleson v. LaBlanche*, 13 Abb. N. C. 147; *W. J. Johnston Co. v. Hunt*, 66 Hun 504, 21 N. Y. Supp. 314, affirmed on opinion below, 142 N. Y. 621; *Strobridge Lithographing Co. v. Crane*, 35 St. Rep. 473.

3. *Eldridge v. Milo*, 129 Misc. 666, 222 N. Y. Supp. 420.

4. *W. J. Johnston Co. v. Hunt*, 66 Hun 504, 21 N. Y. Supp. 314, affirmed on opinion below, 142 N. Y. 621; *Mapleson v. DelPuente*, 13 Abb. N. C. 144.

them cannot be so indispensable as to warrant an injunction.⁵ The salary of the employee may be of substantial aid in determining the question.⁶

Stars of the stage or of the athletic field are frequently enjoined from entering the employ of a rival, though much must depend upon the brilliancy with which they shine. The professional or the business world may produce persons whose abilities are recognized as having an unusual value. An artist may fall in this class.⁷ But salesmen are not accredited with any unusual talents.⁸ The manager of the advertising department of a newspaper may leave his employment without the peril of injunctive process.⁹ Cleaning windows calls for no special skill so as to warrant an injunction.¹⁰ An ordinary workman and cutter of furs is said to have no special genius.¹¹

Services are not of an extraordinary character merely because the parties in their written contract may so stipulate. A contract may provide that the services are special, unique and extraordinary, and that the employee cannot be replaced, and that if the services are refused the employer will suffer irreparable injury which cannot be ascertained in an action at law, and that an injunction may issue to restrain the employer from rendering services for another, yet it remains the duty of the court to reach a conclusion as to the nature of the services.¹² Parties cannot contract for the issuance of an injunction. It is for the court, not for the parties, to determine whether an injunction should be granted.¹³

5. *Kessler & Co. v. Chappelle*, 73 App. Div. 447, 77 N. Y. Supp. 285.

6. *Dockstader v. Reed*, 121 App. Div. 846, 106 N. Y. Supp. 795; *Rogers Theatrical Enterprises v. Comstock*, 225 App. Div. 34, 232 N. Y. Supp. 1. See also, *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312.

7. *Fredericks v. Mayer*, 13 How. Pr. 566.

8. *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312; *Kessler v. Chappelle*, 73 App. Div. 447, 77 N. Y. Supp. 285; *Magid v. Tannenbaum*, 164 App. Div. 142, 149 N. Y. Supp. 445; *Wilkinson Bros. & Co. v. Ebbets*, 103 Misc. 324, 170 N. Y. Supp. 1041.

9. *W. J. Johnston Co. v. Hunt*, 66 Hun 504, 21 N. Y. Supp. 314, affirmed on opinion below, 142 N. Y. 621.

10. *Gilbert v. Wilmer*, 102 Misc. 388, 168 N. Y. Supp. 1043.

11. *Merl, Inc. v. Richfield-Jenks, Inc.*, 125 Misc. 318, 209 N. Y. Supp. 530.

12. *Dockstader v. Reed*, 121 App. Div. 846, 106 N. Y. Supp. 795; *Hammerstein v. Sylva*, 66 Misc. 550, 124 N. Y. Supp. 535; *Harry Hastings Attractions v. Howard*, 119 Misc. 326, 196 N. Y. Supp. 228.

13. *Dockstader v. Reed*, 121 App. Div. 846, 106 N. Y. Supp. 795.

3. Actors, actresses, etc.

The rule under consideration has frequently been applied in cases of violations by leading actors or actresses of their contracts. The services of a performer may be so unusual and unique that an award of damages is not an adequate remedy, and equity, while unable to compel a specific performance of the contract, will restrain such person from appearing for another producer.¹⁴ The fact that the performer may be financially able to respond to any damages awarded, does not preclude the equitable relief.¹⁵ But this relief will not be granted unless the qualities of the performer are exceptional, so that a substitute cannot readily be supplied.¹⁶ Nor will this relief be granted, if

14. *Shubert v. Angeles*, 80 App. Div. 625, 80 N. Y. Supp. 146; *Shubert Theatrical Co. v. Gallagher*, 206 App. Div. 514, 200 N. Y. Supp. 596; *Rogers Theatrical Enterprises v. Comstock*, 225 App. Div. 34, 232 N. Y. Supp. 1; *Canary v. Russell*, 9 Misc. 558, 30 N. Y. Supp. 122; *Hammerstein v. Sylva*, 66 Misc. 550, 124 N. Y. Supp. 535; *Harry Hastings Attractions v. Howard*, 119 Misc. 326, 196 N. Y. Supp. 228; *Pratt v. Montegriffo*, 25 Abb. N. C. 334, 32 St. Rep. 508, 10 N. Y. Supp. 903; *Duff v. Russell*, 14 N. Y. Supp. 134, 39 St. Rep. 266, affirmed on opinion below, 133 N. Y. 678; *Hoyt v. Fuller*, 47 St. Rep. 504, 19 N. Y. Supp. 962; *Daly v. Smith*, 38 Super. Ct. (6 J. & S.) 158, 49 How. Pr. 150.

No relief to "farmers out."—Where a violinist agreed with two middlemen or "Farmers out" of vaudeville performers to perform at such theatres as they might designate for a period of two years at a certain salary under a contract whereby he was to receive no money from them but they were to take such part of the salary paid him by the theatres as exceeded the amounts set forth in the contract as the limitation of his own compensation and whereby they did not obligate themselves to obtain employment for him at any prescribed salary and did

not promise how much he was to receive and it appears that the middlemen were not theatrical producers or managers and had no companies or theatres, the violinist will not, at their suit, be enjoined from performing without their permission. Such a contract has none of the elements which would induce a court to enforce a negative covenant express or implied not to work for others when the services contracted for are special, unique and extraordinary. *Sloman v. Arcaro*, 144 App. Div. 590, 129 N. Y. Supp. 689.

Theatrical season.—A covenant in a contract of employment of an actor or actress for two successive theatrical seasons, each commencing in the fall and ending the following June, that he or she will not perform under other management during the continuance of the contract, does not restrain him or her from performing under other management during the summer months. *Canary v. Russell*, 9 Misc. 558, 30 N. Y. Supp. 122.

15. *Daly v. Smith*, 38 Super. Ct. (6 J. & S.) 158, 49 How. Pr. 150.

16. *Hammerstein v. Mann*, 137 App. Div. 580, 122 N. Y. Supp. 276; *Harry Hastings Attractions v. Howard*, 119 Misc. 326, 196 N. Y. Supp. 228; *Mapleson v. LaBlanche*, 13 Abb. N. C. 147; *Carter v. Ferguson*, 58 Hun 569, 36

the violation of the contract will cause no damage to the employer.¹⁷

A famous singer,¹⁸ an unusual dancer,¹⁹ or a movie queen,²⁰ may, in a proper case, be enjoined from appearing for a rival producer. Even a burlesque comedian or a vaudeville performer may be so gifted that an injunction may properly restrain his employment by a competitor.²¹

Injunctive relief will not be granted if the contract is inequitable or lacks mutuality.²² The contract must bind the employer to furnish employment for the performer, as well as require the performer to render services for the employer.²³ If the contract requires the employer to furnish employment only so long as he considers it to be to his advantage, there is a lack of mutuality, which precludes equitable relief.²⁴ To justify injunctive relief, it must also appear that the plaintiff has performed the conditions of the contract to be performed by him.²⁵ If the performer is an infant, the contract cannot be enforced.²⁶

4. Athletes.

A contract between an athletic club and two pugilists whereby the latter agrees to give an exhibition, may be enforced in equity to the extent that they may be enjoined from a contest at another club before the date specified in

St. Rep. 1, 20 Civ. Proc. 21, 12 N. Y. Supp. 580; Hoyt v. Fuller, 47 St. Rep. 504, 19 N. Y. Supp. 962.

17. DePol v. Sohlke, 30 Super. Ct. (7 Rob.) 280.

18. Walcutt v. Gaskins, 18 Misc. 118, 41 N. Y. Supp. 678; Hammerstein v. Sylva, 66 Misc. 550, 124 N. Y. Supp. 535; Duff v. Russell, 14 N. Y. Supp. 134, 39 St. Rep. 266, affirmed on opinion below, 133 N. Y. 678.

19. Hoyt v. Fuller, 47 St. Rep. 504, 19 N. Y. Supp. 962.

20. Laskey Feature Play Co. v. Fox Vaudeville Co., 93 Misc. 364, 157 N. Y. Supp. 106, affirmed without opinion, 174 App. Div. 372, 159 N. Y. Supp. 1120.

21. Harry Hastings Attractions v. Howard, 119 Misc. 326, 196 N. Y. Supp. 228; Shubert Theatrical Co. v.

Gallagher, 206 App. Div. 514, 201 N. Y. Supp. 577. See also, Shubert Theatrical Co. v. Gallagher, 200 App. Div. 596, 193 N. Y. Supp. 401.

22. Shubert Theatrical Co. v. Coyne, 115 N. Y. Supp. 968.

23. Lawrence v. Dixey, 119 App. Div. 295, 104 N. Y. Supp. 516; Walcutt v. Gaskins, 18 Misc. 118, 41 N. Y. Supp. 678.

24. Lawrence v. Dixey, 119 App. Div. 295, 104 N. Y. Supp. 516.

25. Shubert Theatrical Co. v. Gallagher, 200 App. Div. 596, 193 N. Y. Supp. 401; Pratt v. Montegriffo, 25 Abb. N. C. 334, 32 St. Rep. 508, 10 N. Y. Supp. 903; Hill v. Haberkorn, 24 St. Rep. 756, 6 N. Y. Supp. 474.

26. Aborn v. Janis, 62 Misc. 95, 113 N. Y. Supp. 309.

the contract.²⁷ If, however, the date is uncertain or is to be subsequently fixed, an injunction should not be granted.²⁸

A ball player of exceptional skill, having contracted to play for a certain team, may be restrained from playing with a rival club.²⁹ The contract, however, must be definite and complete. If the contract provides that after the completion of the season the club shall reserve the right to employ the player for the following season, until a contract has been consummated for such season, there is not such a complete obligation as will justify an injunction.³⁰ Moreover, the monopolistic nature of organized baseball, and the lack of equity in the players' contracts, may preclude equitable relief.³¹

5. Necessity of negative covenant.

A negative covenant not to enter the employ of another does not seem to be in all cases a necessary element for equitable jurisdiction. If the contract contemplates that the plaintiff shall have the benefit of all of the services, a negative covenant not to work for others is easily implied.³²

6. Effect of stipulated damages.

The fact that the contract contains a stipulation for liquidated damages in case of a breach and that the employee may be financially responsible, does not necessarily deprive the court of its equitable jurisdiction.³³ Such circumstance, however, is one which may properly be considered, with the other circumstances of the case, in determining how the discretion of the court shall be exercised.³⁴

27. *Arena Athletic Club v. McPartland*, 41 App. Div. 352, 58 N. Y. Supp. 477.

28. *Arena Athletic Club v. McPartland*, 41 App. Div. 352, 58 N. Y. Supp. 477.

29. *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. Supp. 779, 24 Abb. N. C. 393.

30. *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. C. 419.

31. *American League Baseball Club*

v. Chase, 86 Misc. 441, 149 N. Y. Supp. 6.

32. *Duff v. Russell*, 14 N. Y. Supp. 134, 39 St. Rep. 266; *Hoyt v. Fuller*, 47 St. Rep. 504, 19 N. Y. Supp. 962; *Daly v. Smith*, 38 Super. Ct. (6 J. & S.) 158, 49 How. Pr. 150. Compare, *Butler v. Gallette*, 21 How. Pr. 465.

33. *Reynolds Co. v. Dreyer*, 12 Misc. 368, 33 N. Y. Supp. 649.

34. *Magid v. Tannenbaum*, 164 App. Div. 142, 149 N. Y. Supp. 445; *Mapleson v. Del Puente*, 13 Abb. N. C. 144.

7. Contract illegal, inequitable, lacking mutuality.

In order for a contract of employment to be enforceable in equity, it must be one for the breach of which damages will not afford an adequate compensation; the plaintiff must come into court with clean hands, and his contract must not be so oppressive as to render it unjust to the defendant to enforce it. It must be one in which there are mutual promises, or which is founded on a sufficient consideration; its terms must be certain, and in respect to it the minds of the parties must have distinctly met so that there can be no misunderstanding of their rights and obligations.³⁵

A contract which, in language, requires one to render certain services, but does not require the other contracting party to accept the services, is unenforceable for want of mutuality.³⁶ In addition to the negative covenant not to perform service for another, there must also be an affirmative covenant to perform work for the person maintaining the suit.³⁷ A contract will not be enforced in equity unless it is fair and reasonable.³⁸ The terms of the contract must be definite and certain.³⁹

8. Performance by plaintiff.

An injunction will not be issued to restrain an employee from violating his contract of employment, except upon proof that the plaintiff has performed all of the covenants of the contract to be performed by him.⁴⁰ If a contract is a continuation of an earlier one, the plaintiff will not prevail unless he has fulfilled his obligations under the former engagement.⁴¹

35. *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. C. 419. See also, *American League Baseball Club v. Chase*, 86 Misc. 441, 149 N. Y. Supp. 6.

36. *Lawrence v. Dixey*, 119 App. Div. 295, 104 N. Y. Supp. 516; *Star Co. v. Press Pub. Co.*, 162 App. Div. 486, 147 N. Y. Supp. 579; *Witmark v. Peters*, 164 App. Div. 366, 149 N. Y. Supp. 642; *Walcutt v. Gaskins*, 18 Misc. 118, 41 N. Y. Supp. 678; *American League Baseball Club v. Chase*, 86 Misc. 441, 149 N. Y. Supp. 6; *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. C.

419; *Shubert Theatrical Co. v. Coyne*, 115 N. Y. Supp. 968.

37. *Star Co. v. Press Pub. Co.*, 162 App. Div. 486, 147 N. Y. Supp. 579.

38. *Shubert Theatrical Co. v. Coyne*, 115 N. Y. Supp. 968.

39. *Arena Athletic Club v. McPartland*, 41 App. Div. 352, 58 N. Y. Supp. 477; *Metropolitan Exhibition Co. v. Ewing*, 24 Abb. N. C. 419.

40. *Hill v. Haberkorn*, 24 St. Rep. 756, 6 N. Y. Supp. 474.

41. *Hill v. Haberkorn*, 24 St. Rep. 756, 6 N. Y. Supp. 474.

9. Competitor as party defendant.

Injunctive relief against the rendering of services for a competitor is made more effective by enjoining the competitor from giving employment to the employee in question.⁴² The competitor may be enjoined from advertising the employment.⁴³ On his own motion he should be allowed to come in as a party defendant.⁴⁴ The fact that he had no knowledge of the negative covenants in the prior contract of employment, may tend to induce the court to refuse the equitable remedy.⁴⁵ The liability of a labor union seeking to influence employees to break their contracts of employment is discussed at another place.⁴⁶

10. Action by employee.

As a general rule, the cases which involve the right to injunctive relief to restrain a violation of a contract of employment are maintained by the employer against the employee. An employee cannot compel the employer to continue the business.⁴⁷ If the contract is breached, or threatened to be breached, by the employer, the employee will find an adequate remedy at law for damages.⁴⁸ Even

42. *Rogers Theatrical Enterprises v. Comstock*, 225 App. Div. 34, 232 N. Y. Supp. 1.

43. *Laskey Feature Play Co. v. Fox Vaudeville Co.*, 93 Misc. 364, 157 N. Y. Supp. 106, affirmed without opinion, 174 App. Div. 872, 159 N. Y. Supp. 1120.

44. *Strowbridge Lithographing Co. v. Crane*, 35 St. Rep. 474.

45. *Levy v. Cosmos*, 221 App. Div. 533, 224 N. Y. Supp. 486.

46. See Article VIII.

47. *Bronk v. Riley*, 50 Hun 489, 3 N. Y. Supp. 446, 20 St. Rep. 401.

48. *Barcus v. Cooper*, 184 App. Div. 111, 171 N. Y. Supp. 654; *Cuppy v. Ward*, 187 App. Div. 625, 176 N. Y. Supp. 233, affirmed, 227 N. Y. 603; *Bronk v. Riley*, 50 Hun 489, 3 N. Y. Supp. 446, 20 St. Rep. 401; *Auerbach v. Northland Rubber Co.*, 161 N. Y. Supp. 396.

Hotel stenographer.—A contract by

which the plaintiff was given the exclusive privilege of conducting a stenographer's office in a hotel in consideration of the payment of a monthly rent and the doing of the private correspondence of the hotel management, with a proviso that if the services be not satisfactorily performed, the agreement could be revoked, with the same privilege to the plaintiff if the office be not found sufficiently remunerative, is not a lease but a mere agreement to allow the plaintiff to carry on said business in the hotel. Being revocable by either party, neither can insist upon maintaining the agreement against the opposition of the other. Hence, when the plaintiff's privilege has been revoked she is not entitled to an injunction *pendente lite*, restraining the defendant from interfering with the prosecution of said business in the hotel. Moreover, assuming that the defendant had

where there is some difficulty in ascertaining the damages, the courts will, nevertheless, refuse to compel an employer to continue the employment.⁴⁹ The rule applies to employees of a municipal corporation, as well as to those of private corporations or individuals.⁵⁰ But an exceptional case where the contract creates obligations other than a mere employment, may justify injunctive relief. A contract between an author and a playwright for the sharing of profits in the dramatization of one of the author's works, may not be abandoned by the author after a part performance by the playwright, and an injunction may be granted restraining the dramatization by another as well as performances thereof.⁵¹

H. Contract regulating conduct of employee after termination of employment.

1. In general.

As has been stated above,⁵² an employee will not be restrained from violating his covenant not to work for a competitor, unless the services are of a special, unique and extraordinary character. This principle has been discussed in connection with contracts of employment which had not expired at the time of the breach of the contract. The same rule is applied where the contract of employment has expired. That is to say, a covenant in a contract of hiring that after the expiration of the term of service the employee will not enter the employment of a rival employer, will not be enforced by injunction, unless the services in question are of that class described as "special, unique and extraordinary."⁵³ Moreover, even when the services are so con-

no right to revoke and prevent the plaintiff from continuing her business, her remedy at law is adequate, if there is no question as to the defendant's responsibility, and a suit in equity for an injunction does not lie. *Hess v. Roberts*, 124 App. Div. 328, 108 N. Y. Supp. 894.

49. *Bronk v. Riley*, 50 Hun 489, 3 N. Y. Supp. 446, 20 St. Rep. 401; *Auerbach v. Northland Rubber Co.*, 161 N. Y. Supp. 396.

50. *Miller v. Warner*, 42 App. Div. 208, 59 N. Y. Supp. 956.

51. *House v. Clemens*, 16 Daly, 3, 9 N. Y. Supp. 484.

52. See, *supra*, II-G, Contract for personal services.

53. *Kaunagraph Co. v. Stampagraph Co.*, 235 N. Y. 1; *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312; *Oppenheimer v. Hirsch*, 5 App. Div. 232, 38 N. Y. Supp. 311; *Star Co. v. Press Pub. Co.*, 162 App. Div. 486, 147 N. Y. Supp. 579; *Universal Talking Machine Co. v. English*, 34 Misc. 342, 69 N. Y. Supp. 813; *Samuels Stores, Inc. v. Portner*, 125 Misc. 438, 211 N. Y. Supp.

sidered, there is authority for the view that an injunction will not issue, the court taking the position that affirmative as well as negative covenants are necessary.⁵⁴ In any event, a covenant not to work for another during a long period, is so unreasonable that a court of equity will not assume jurisdiction.⁵⁵ Such a contract, when there is involved no element of secret or valuable information, may be void as in restraint of trade and personal liberty.⁵⁶ The situation is entirely different where the case presents some feature of unfair dealing, or where there is a covenant not to do some particular act as distinguished from a general covenant not to enter other employment. Thus, it is clear that the employee may be restrained from divulging trade secrets, or soliciting the customers of the former employer.⁵⁷

2. Divulgence of trade secrets.

Trade secrets will be protected by a court of equity. After the termination of a contract of hiring, an employee may be restrained from divulging or utilizing to the prejudice of his former employer trade secrets which he learned while in such employment.⁵⁸ Where trade secrets are involved,

673; *Julian Goldman Stores, Inc. v. Mitchell*, 126 Misc. 229, 214 N. Y. Supp. 3.

54. *Star Co. v. Press Pub. Co.*, 163 App. Div. 486, 147 N. Y. Supp. 579.

55. *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312. See also, *Oppenheimer v. Hirsch*, 5 App. Div. 232, 38 N. Y. Supp. 311.

56. *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312.

57. See the following paragraphs.

58. *McCall v. Wright*, 193 N. Y. 143; *Kaunagraph Co. v. Stampagraph Co.*, 235 N. Y. 1; *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312; *Little v. Gallus*, 4 App. Div. 569, 38 N. Y. Supp. 487; *National Gum & Mica Co. v. Braendly*, 27 App. Div. 219, 51 N. Y. Supp. 93; *Harvey Company v. National Drug Co.*, 75 App. Div. 103, 77 N. Y. Supp. 674; *Boosing v. Dorman*, 148 App. Div. 824, 133 N. Y. Supp. 910, affirmed without opinion, 210 N. Y. 529; *Vulcan Detinning Co. v. Assmann*,

185 App. Div. 399, 173 N. Y. Supp. 334; *Eastman Kodak Co. v. Powers Film Products*, 189 App. Div. 556, 179 N. Y. Supp. 325; *Kremer v. Kremer*, 221 App. Div. 747, 225 N. Y. Supp. 260; *Toff Protectograph Co. v. Hirschberg*, 100 Misc. 418, 165 N. Y. Supp. 906; *Goldschmidt v. Sachs*, 162 N. Y. Supp. 323. See also, *Roosen v. Carlson*, 46 App. Div. 233, 62 N. Y. Supp. 157.

Drug Formulae.—A drug manufacturing corporation, possessing various secrets concerning the manufacture of several pharmaceutical preparations, which necessarily discloses such secrets to one of its employees, will, in the event of such employee's entering the service of a rival drug manufacturing company, be granted an injunction restraining such former employee from using or disclosing such trade secrets. The corporation is not, however, entitled to an injunction restraining the employee from using or disclosing pri-

a covenant not to enter the employ of the rival manufacturer may be enforced by injunction.⁵⁹ Nor will the employee be allowed to set up a competing establishment.⁶⁰ Even in the absence of an express negative covenant, the law raises an implied covenant that an employee who has occupied a confidential relation toward his employer, will not divulge any trade secrets imparted to him, nor any discovered by him in the course of his employment.⁶¹

It is no defense that the contract of employment was at will or for an indefinite period.⁶² It is not necessary that the secret be patented or patentable.⁶³ A violation by the plaintiff of the federal statutes relating to monopolies will afford the defendant no excuse.⁶⁴ But, if the employer has violated the contract in a substantial matter, he cannot complain of a violation by the employee.⁶⁵

The existence of a trade secret or secret process may be a contested fact in the case. If there is no "secret," the principle here discussed is not applicable.⁶⁶ If patented in a foreign country, the process may be so well known, that an injunction will not be granted.⁶⁷

The injunctive remedy will lie, not only against the faithless servant, but against a rival concern seeking to enlist his services.⁶⁸

vate formulae sent to it by various physicians through the country for the purpose of having medical preparations compounded in accordance therewith, as the physicians alone could complain of the employee's action in using the formulae. *Harvey Co. v. National Drug Co.*, 75 App. Div. 103, 77 N. Y. Supp. 674.

59. *McCall v. Wright*, 198 N. Y. 143; *Eastman Kodak Co. v. Powers Film Products, Inc.*, 189 App. Div. 556, 179 N. Y. Supp. 325; *Todd Protectograph Co. v. Hirschberg*, 100 Misc. 418, 165 N. Y. Supp. 906.

60. *Little v. Gallus*, 4 App. Div. 569, 38 N. Y. Supp. 487; *Todd Protectograph Co. v. Hirschberg*, 100 Misc. 418, 165 N. Y. Supp. 906.

61. *Kaumagraph Co. v. Stampagraph Co.*, 235 N. Y. 1; *Little v. Gallus*, 4 App. Div. 569, 38 N. Y. Supp. 487;

Boosing v. Dorman, 148 App. Div. 824, 133 N. Y. Supp. 910, affirmed without opinion, 210 N. Y. 529; *Vulcan Detinning Co. v. Assman*, 185 App. Div. 399, 173 N. Y. Supp. 334.

62. *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312; *National Gum & Mica Co. v. Braendly*, 27 App. Div. 219, 51 N. Y. Supp. 93.

63. *Vulcan Detinning Co. v. Assman*, 185 App. Div. 399, 173 N. Y. Supp. 334.

64. *Eastman Kodak Co. v. Powers Film Products, Inc.*, 189 App. Div. 556, 179 N. Y. Supp. 325.

65. *N. Y. Chemical Co. v. Halleck*, 15 N. Y. Supp. 517.

66. *Kaumagraph Co. v. Stampagraph Co.*, 235 N. Y. 1.

67. *Kaumagraph Co. v. Stampagraph Co.*, 235 N. Y. 1.

68. *Vulcan Detinning Co. v. Assman*,

3. Soliciting customers of former employer; mailing lists.

A covenant in a contract of employment that the employee after the termination of the employment will not solicit the customers of the employer, may be enforced by an injunction.⁶⁹ The calculation of the damages sustained by a violation of the covenant is so difficult that but slight injury is necessary to sustain the action.⁷⁰ The fact that the employee deposited a certain sum of money with the employer for the faithful performance of his duties, and that the contract provided that such sum should be stipulated damages for a violation of the agreement, does not bar equitable relief.⁷¹

An express negative covenant of this character is said to be necessary in order to justify a court of equity in enjoining such solicitation;⁷² but cases may be found where the circumstances justify the relief without resort to a negative covenant.⁷³ The relief may be granted on the broad principle that equity will not permit an employee to use for his own advantage and to the prejudice of his employer, confidential information which he has acquired in the course

185 App. Div. 399, 173 N. Y. Supp. 334; *Eastman Kodak Co. v. Powers Film Products*, 189 App. Div. 556, 179 N. Y. Supp. 325.

69. *Mutual Milk, etc. Co. v. Prigge*, 112 App. Div. 652, 98 N. Y. Supp. 458; *Mutual Milk Co. v. Heldt*, 120 App. Div. 795, 105 N. Y. Supp. 661; *New York Wet Wash Co. v. Unger*, 170 App. Div. 761, 156 N. Y. Supp. 598; *People's Coat, etc., Supply Co. v. Light*, 171 App. Div. 671, 157 N. Y. Supp. 15, affirmed without opinion, 224 N. Y. 727; *Eastern New York Wet Wash Laundry Co. v. Abrahams*, 173 App. Div. 788, 160 N. Y. Supp. 69; *A. Finkenberg's Sons v. Adest*, 203 App. Div. 631, 197 N. Y. Supp. 246; *Reynolds Co. v. Dreyer*, 12 Misc. 368, 33 N. Y. Supp. 649; *Witkop & Holmes Co. v. Boyce*, 61 Misc. 126, 112 N. Y. Supp. 874, affirmed without opinion, 131 App. Div. 922, 115 N. Y. Supp. 1150; *Witkop & Holmes Co. v. Boyce*, 64 Misc. 374, 118 N. Y. Supp. 461; *Todd Protectograph Co. v. Hirschberg*,

100 Misc. 418, 165 N. Y. Supp. 906; *J. & J. G. Wallach Laundry System v. Fortcher*, 116 Misc. 712, 191 N. Y. Supp. 409; *Davies v. Racer*, 72 Hun 43, 25 N. Y. Supp. 293, 55 St. Rep. 191.

A successor of the employer is not entitled to relief, for the contract for services is not assignable. *Avenue Z Wet Wash Laundry Co. v. Yarmush*, 129 Misc. 427, 221 N. Y. Supp. 506.

70. *Davies v. Racer*, 72 Hun 43, 55 St. Rep. 191, 25 N. Y. Supp. 293.

71. *A. Finkenberg's Sons v. Adest*, 203 App. Div. 631, 197 N. Y. Supp. 246; *Reynolds v. Dreyer*, 12 Misc. 368, 33 N. Y. Supp. 649.

72. *Boosing v. Dorman*, 148 App. Div. 824, 133 N. Y. Supp. 910, affirmed without opinion, 210 N. Y. 529; *Goldberg v. Goldberg*, 205 App. Div. 435, 200 N. Y. Supp. 3. See also, *Scott v. Scott*, 186 App. Div. 518, 174 N. Y. Supp. 583.

73. *Witkop & Holmes Co. v. Boyce*, 64 Misc. 374, 118 N. Y. Supp. 461.

of his employment.⁷⁴ Thus, the relief may be granted as against an infant employee.⁷⁵

Like other contracts, one aimed against the solicitation of customers will not be enforced in equity unless the restriction is reasonable. If it extends for an unreasonable length of time, equity will grant no relief. It is doubtful whether one running for five years after the termination of the employment will receive the support of equity.⁷⁶ But a covenant for eighteen months or two years may be sustained by injunctive relief.⁷⁷ The restriction must also be reasonable as to territory and as to number of occupations.⁷⁸

The owner of a competing business may be joined as a party defendant and enjoined from using the employee's information as to customers.⁷⁹

Questions arising out of the use of mailing lists are similar to those of soliciting customers. The wrongful use of a list of customers is expressly prohibited by the Penal Law.⁸⁰ An employee may be enjoined from violating a provision in his contract forbidding him from using or disclosing the employer's list of customers.⁸¹ A rival trader may also be enjoined from using a mailing list which he has wrongfully secured from a former employee of the plaintiff.⁸² But,

74. *Witkop, etc., Co. v. Boyce*, 61 Misc. 126, 112 N. Y. Supp. 874, affirmed without opinion, 131 App. Div. 922, 115 N. Y. Supp. 1150.

75. *Mutual Milk, etc., Co. v. Prigge*, 112 App. Div. 652, 98 N. Y. Supp. 458; *Witkop & Holmes Co. v. Boyce*, 61 Misc. 126, 112 N. Y. Supp. 874, affirmed without opinion, 131 App. Div. 922, 115 N. Y. Supp. 1150.

76. *New York Linen Supply, etc., Co. v. Schachter*, 125 Misc. 805, 212 N. Y. Supp. 72.

77. *Eastern New York Wet Wash Laundry Co. v. Abrahams*, 173 App. Div. 788, 160 N. Y. Supp. 69; *Wallach Laundry System, Inc. v. Fortcher*, 116 Misc. 712, 191 N. Y. Supp. 409.

78. *Wallach Laundry System, Inc. v. Fortcher*, 116 Misc. 712, 191 N. Y. Supp. 409.

79. *People's Coat, etc., Supply Co. v. Light*, 171 App. Div. 671, 157 N. Y. Supp. 115, affirmed without opinion, 224

N. Y. 727; *Witkop, etc., Co. v. Great Atlantic, etc., Tea Co.*, 69 Misc. 90, 124 N. Y. Supp. 956.

80. Penal Law, § 553, subd. 6, 7. And see, *Witkop & Holmes Co. v. Great Atlantic, etc., Co.*, 69 Misc. 90, 124 N. Y. Supp. 956; *Kremer v. Kremer*, 221 App. Div. 747, 225 N. Y. Supp. 260; *New York Towel Supply Co. v. Lally*, 162 N. Y. Supp. 247.

81. *Altschul-Batterson Co. v. Markowitz*, 213 App. Div. 769, 210 N. Y. Supp. 506; *Todd Protectograph Co. v. Hirschberg*, 100 Misc. 418, 165 N. Y. Supp. 906; *Shevers Ice Cream Co. v. Polar Products Co.*, 194 N. Y. Supp. 44.

82. *Convise v. J. C. Brownstone & Co.*, 209 App. Div. 584, 205 N. Y. Supp. 32; *Witkop, etc., Co. v. Great Atlantic, etc., Tea Co.*, 69 Misc. 90, 124 N. Y. Supp. 956; *Shevers Ice Cream Co. v. Polar Products Co.*, 194 N. Y. Supp. 44.

where there is no express negative covenant, and the information in question was not imparted to the employee in confidence, the new employer has a right to use the information which the employee lawfully acquired in his former employment.⁸³ A list of customers of a character that it can be acquired from a city or telephone directory, is not such a list as equity will protect.⁸⁴

4. Agreement not to start competing business.

A covenant not to commence a competing business within a specified time after the expiration of a contract of hiring, may, in a proper case, be enforced by injunction.⁸⁵ Such relief will not be granted unless the court deems the contract equitable.⁸⁶ A negative covenant of this character must be express, for the courts will not imply such a covenant.⁸⁷ In the absence of an express negative covenant, the employee may start a rival enterprise, and it is no objection to such conduct that he utilizes information he may have acquired from the former employment;⁸⁸ provided there is involved no element of trade secrets or confidential information.

The employee cannot copy a list of the employer's customers with whom he has no personal dealings, and use that list either in his own or another business in competition with his former employer. Nor, if a list be furnished him confidentially, for a use other than solicitation for a continuance of business, can he make use of that list for the purpose of solicitation of trade in competition with the former employer. Nor can he by false representations that he is still in the employ of his former employer obtain business

83. *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App. Div. 715, 132 N. Y. 37.

84. *Levy v. Cosmos*, 221 App. Div. 533, 224 N. Y. Supp. 486.

85. *Amalgamated Industrial Corp. v. Teichholtz*, 177 App. Div. 456, 164 N. Y. Supp. 289; *Hackett v. A. L. & J. Reynolds Co.*, 30 Misc. 733, 52 N. Y. Supp. 1076; *Wilkinson Bros. & Co. v. Ebbets*, 103 Misc. 324, 170 N. Y. Supp. 1041; *Scadron's Sons, Inc. v. Susskind*, 132 Misc. 406, 229 N. Y. Supp. 209.

Discharged by plaintiff.—The plain-

tiff may have a right to enforce the contract, although the employment was terminated by his act. *Amalgamated Industrial Corp. v. Teichholz*, 177 App. Div. 456; 164 N. Y. Supp. 289.

86. *Gilbert v. Wilmer*, 102 Misc. 388, 168 N. Y. Supp. 1043.

87. *Boosing v. Dorman*, 148 App. Div. 824, 133 N. Y. Supp. 910, affirmed without opinion, 210 N. Y. 529; *Scott v. Scott*, 186 App. Div. 518, 174 N. Y. Supp. 583; *New York Towel Supply Co. v. Lally*, 162 N. Y. Supp. 247.

88. *Boosing v. Dorman*, 148 App. Div. 824, 133 N. Y. Supp. 910, affirmed

for himself or another. He must not resort to false statements or unfair means to divert the customer of his former employer to himself, if he enters into competition with his former employer. But if his agreement of employment did not provide expressly that he, on the termination of his contract, would not engage in a similar business, and he enters upon a fair and open competition with the former employer, he can use the knowledge that he has acquired of the customers of his employer with whom he dealt.⁸⁹

I. Contract against competition on sale of business.

1. General rule.

Early in legal history, covenants against trade were deemed against public policy and were unenforceable. Now, however, there is no dispute but that, upon the sale of a business, a covenant by the seller not to engage in a competing business, the covenant being reasonable as to territory and duration, will be enforced by injunction.⁹⁰ The

without opinion, 210 N. Y. 529; Scott v. Scott, 186 App. Div. 518, 174 N. Y. Supp. 583.

^{89.} Scott v. Scott, 186 App. Div. 518, 174 N. Y. Supp. 583; Storey v. Excelsior Shook & Lumber Co., Inc., 198 App. Div. 505, 190 N. Y. Supp. 614.

Sign indicating former employment.—The defendant, who had been hired as a watchmaker and clerk by the plaintiff, a jeweler, having left his employment, opened a store a few doors from that of the plaintiff, and put up a sign "A. Horowitz, late with J. P. VanWyck" (the plaintiff). Held, that the plaintiff could not restrain him from using his (plaintiff's) name on the sign. VanWyck v. Horowitz, 39 Hun 237.

^{90.} Diamond Match Co. v. Roeber, 106 N. Y. 473; Francisco v. Smith, 143 N. Y. 488; Zimmerman v. Gerzog, 13 App. Div. 210, 43 N. Y. Supp. 339; Union Mills v. Harder, 116 App. Div. 22, 101 N. Y. Supp. 309, modified, 191 N. Y. 483; Mahler Co. v. Mahler, 160 App. Div. 548, 145 N. Y. Supp. 764; Alden v. Wright, 175 App. Div. 692,

162 N. Y. Supp. 668; Comerma Co. v. Comerma, 182 App. Div. 576, 169 N. Y. Supp. 894, affirmed, 225 N. Y. 676; Standard Slide Corp. v. Appel, 190 App. Div. 799, 180 N. Y. Supp. 431; Lappono v. Marmone, 204 App. Div. 496, 198 N. Y. Supp. 433; Jochum Bros., Inc. v. Ridgewood Pie Baking Co., 210 App. Div. 428, 206 N. Y. Supp. 252; Fintz v. Levy, 221 App. Div. 583, 224 N. Y. Supp. 494; Niles v. Fenn, 12 Misc. 470, 33 N. Y. Supp. 857; Booth v. Seibold, 37 Misc. 101, 74 N. Y. Supp. 776; National Brake Co. v. Ackley, 80 Misc. 251, 140 N. Y. Supp. 1091; Komow v. Simplex Cloth Cutting Machine Co., 109 Misc. 358, 179 N. Y. Supp. 682; Bernfeld v. Freedenberg, 125 Misc. 645, 211 N. Y. Supp. 692; Amsterdam v. Marmor, 125 Misc. 865, 212 N. Y. Supp. 300; National Wall Paper Co. v. Hobbs, 90 Hun 288, 70 St. Rep. 599, 35 N. Y. Supp. 932; U. S. Cordage Co. v. William Walls Sons' Rope Co., 90 Hun 429, 35 N. Y. Supp. 978; Muller v. Vettel, 25 How. Pr. 350; Ewing v. Johnson, 34 How. Pr. 202; Fischman v. Berkowitz, 130

remedy at law for damages is too uncertain and the damages rest too much in conjecture for the courts to confine the buyer to an action at law.⁹¹ The law particularly recognizes the property rights which may inhere in "good will," and may restrain conduct on the part of the seller which will prejudice the value of that asset.⁹² The rule is applied, although the business sold is of a professional rather than of a mercantile nature.⁹³ Upon the sale of a business by a corporation, the stockholders may individually covenant against entering a competing line of business, and an injunction to that end may issue against them.⁹⁴ A covenant restraining future trade activities may be contained in a partnership agreement.⁹⁵ On a sale of a business by a partnership, the covenant may bind an individual member of the firm.⁹⁶

The covenant must be express, as the law will not imply a covenant against resuming trade at another location.⁹⁷ And it must be in writing. An oral covenant may be within the provision of the Statute of Frauds as to contracts not

N. Y. Supp. 791; *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 Super. Ct. (16 J. & S.) 442, appeal dismissed, 93 N. Y. 658.

91. *Muller v. Vettel*, 25 How. Pr. 350; *Fischman v. Berkowitz*, 130 N. Y. Supp. 791.

92. *Kilmer v. Kilmer*, 175 App. Div. 670, 162 N. Y. Supp. 617, affirmed without opinion, 225 N. Y. 705; *Niles v. Fenn*, 12 Misc. 470, 33 N. Y. Supp. 857; *Goetz v. Ries*, 123 N. Y. Supp. 433.

93. *Niles v. Fenn*, 12 Misc. 470, 33 N. Y. Supp. 857.

94. *Union Mills v. Harder*, 116 App. Div. 22, 101 N. Y. Supp. 309, modified, 191 N. Y. 483; *Comerma Co. v. Comerma*, 182 App. Div. 576, 169 N. Y. Supp. 884, affirmed, 225 N. Y. 676. See also, *U. S. Cordage Co. v. William Walls Son's Rope Co.*, 90 Hun 429, 70 St. Rep. 602, 35 N. Y. Supp. 978.

95. *Sanford Dairy Co. v. Sanford*, 114 App. Div. 862, 100 N. Y. Supp. 270; *Shearman v. Hart*, 14 Abb. Pr. 358.

96. *American Ice Co. v. Meckel*, 109 App. Div. 93, 95 N. Y. Supp. 1060.

97. *Mahler Co. v. Mahler*, 160 App. Div. 548, 145 N. Y. Supp. 764; *Close v. Flesher*, 8 Misc. 299, 28 N. Y. Supp. 737; *White v. Jones*, 24 Super. Ct. (1 Rob.) 321, 1 Abb. Pr. N. S. 328.

A retiring partner who releases and assigns all his interest in the good will of the business of the firm to his co-partner, does not thereby abandon the right to establish and carry on a business similar to that of the late firm, provided he does not commit any act to mislead customers into the belief either that he is carrying on the business as the successor of the old firm, or that when dealing with him they are dealing with such successor. No one who was formerly in the employment of the displaced firm, but upon its dissolution unites with such retiring partner in establishing such new business, becomes thereby subject to an action, by the purchaser of the good will, for an injunction or damages. *White v. Jones*, 24 Super.

to be performed within one year.⁹⁸ Moreover, the agreement must be definite and certain. A court of equity will enforce the agreement only so far as it is free from ambiguity.⁹⁹

2. Reasonableness of restriction.

The contract is not enforceable in equity unless it is reasonable. A general restraint of trade is against public policy.¹ The territory within which the competition is forbidden should have some relation to the competition which is feared. If the business is of a local nature, the restriction should be local. If the business is national in scope, the restriction may well cover the entire country with the possible exception of a single state.² Relief will not be denied because the contract does not fix the period of the restraint.³ If the contract is unfair and oppressive as to one of the parties, equity will not enforce it as against him.⁴ If the agreement is without consideration, an injunction will not issue.⁵

3. Monopoly.

It is not a defense to equitable relief that the plaintiff in the purchase of the defendant's business is designing to create a monopoly. The seller, while retaining the benefits of his contract, cannot urge as a defense the monopolistic intentions of the buyer.⁶ The fact that the purchaser afterwards buys the business of other rival dealers with similar restrictions on the continuance of business, does not deprive him of a right to resort to equity.⁷

4. Damages.

In addition to injunctive relief, the plaintiff may be awarded such damages as he may have sustained on account of the wrongful competition.⁸ The measure of damages is

Ct. (1 Rob.) 321, 1 Abb. Pr. N. S. 328.

98. *Shapiro v. Balaban*, 210 App. Div. 47, 205 N. Y. Supp. 208; *Stephens v. Aulls*, 3 T. & C. 781.

99. *Sanford Dairy Co. v. Sanford*, 114 App. Div. 862, 100 N. Y. Supp. 270.

1. *Booth v. Seibold*, 37 Misc. 101, 74 N. Y. Supp. 776.

2. *Diamond Match Co. v. Roeber*, 35 Hun 421, 21 Week. Dig. 353, affirmed, 106 N. Y. 473.

3. *Lappono v. Marmone*, 204 App. Div. 496, 198 N. Y. Supp. 433.

4. *Fries v. Parr*, 139 N. Y. Supp. 220.

5. *Fries v. Parr*, 139 N. Y. Supp. 220.

6. *National Wall Paper Co. v. Hobbs*, 90 Hun 288, 70 St. Rep. 599, 35 N. Y. Supp. 932.

7. *Booth v. Seibold*, 37 Misc. 101, 74 N. Y. Supp. 776.

8. *Muller v. Vittel*, 25 How. Pr. 350. A reference may be had to determine

the difference between the value of the business with the competition and its value with a faithful performance of the contract.⁹ Irreparable damage is a necessary element for the granting of injunctive relief; and, if the unfair competition of the seller of a business has caused no damage to the buyer, an injunction as well as damages may be refused.¹⁰

5. Provision in contract for stipulated damages.

An injunction may be granted against the wrongful competition, although the contract provides for liquidated damages in case of a violation.¹¹ Particularly is this true, if it appears that the financial responsibility of the seller is doubtful.¹² A different conclusion might be reached if the contract indicates that the buyer intended the liquidated damages as the sole remedy for a breach; but the mere fact that the contract contains a clause for liquidated damage does not necessarily show that such was to be the only remedy.¹³

6. What constitutes a violation.

A covenant against trade receives no special favor in its interpretation, and ordinarily forbids only those acts which are particularly proscribed.¹⁴ A covenant against engaging in a competing business may be violated where the relation of the promisor to the new business is either as principal or as employee.¹⁵ He will not be allowed to conduct a rival

the damages sustained by the plaintiff. *Muller v. Vittel*, 25 How. Pr. 350.

9. *Amsterdam v. Marmor*, 125 Misc. 865, 212 N. Y. Supp. 300.

10. *Goldman v. Bootman*, 179 App. Div. 767, 167 N. Y. Supp. 196.

11. *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Zimmerman v. Gerzog*, 13 App. Div. 210, 43 N. Y. Supp. 339. Compare, *Vincent v. King*, 13 How. Pr. 234.

12. *Zimmerman v. Gerzog*, 13 App. Div. 210, 43 N. Y. Supp. 339.

13. *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

14. **Five blocks.**—Under an agreement made by the plaintiffs and defendant at the time the plaintiffs

bought the defendant's store that the defendant would not engage in a similar business within a radius of five square blocks from the location of the store sold by the defendant, an injunction will be granted where it appears that the defendant opened a store within the fifth block from plaintiff's store, though it was not within the distance of five measured blocks, on a basis of twenty blocks to a mile. *Bernfeld v. Freedenberg*, 125 Misc. 645, 211 N. Y. Supp. 692.

15. *Standard Slide Corp. v. Appel*, 190 App. Div. 799, 180 N. Y. Supp. 431; *Muller v. Vittel*, 25 How. Pr. 350; *Ewing v. Johnson*, 34 How. Pr. 202.

establishment in the name of his wife or of another person.¹⁶ He cannot form a corporation as a cloak for his new business.¹⁷ Equity will not permit him to give away as an advertising scheme goods which are similar to those which he has agreed not to sell.¹⁸ A covenant of this character will not, however, forbid him from making loans to a competing establishment,¹⁹ but other acts of assistance in addition to pecuniary aid may show a violation.²⁰

Even in the absence of a negative covenant regulating his conduct, there are some business activities which may be forbidden as unfair competition.²¹ In the absence of a covenant, he may solicit his former customers within the limits of fair competition,²² but he cannot circularize such customers with statements reflecting upon the former business and its management.²³ He cannot infringe the trade name of the business which he has sold;²⁴ but ordinarily he will be allowed to use his own name for the new business, and may advertise that he was formerly connected with the older enterprise.²⁵

7. By whom enforced.

Not only may the negative covenant against a competing enterprise be enforced by the purchaser of the business, but in a proper case his successor may receive relief. The covenant is a valuable right in connection with the business it is designed to protect, and it may be assigned with a sub-

16. See *Shapiro v. Balaban*, 210 App. Div. 47, 205 N. Y. Supp. 208.

17. *Mahler Co. v. Mahler*, 160 App. Div. 548, 145 N. Y. Supp. 764; *Komow v. Simplex Cloth Cutting Machine Co.*, 109 Misc. 358, 179 N. Y. Supp. 682; *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 Super. Ct. (16 J. & S.) 442, appeal dismissed, 93 N. Y. 658.

18. *Mackinnon Pen Co. v. Fountain Ink Co.*, 48 Super. Ct. (16 J. & S.) 442, appeal dismissed, 93 N. Y. 658.

19. *Salzman v. Siegelman*, 102 App. Div. 406, 92 N. Y. Supp. 344.

20. *Amsterdam v. Marmor*, 125 Misc. 865, 212 N. Y. Supp. 300.

21. See, *infra*, VII, Unfair competition.

22. *Kates v. Bok*, 139 App. Div. 640, 124 N. Y. Supp. 297; *Marcus v. Ward*, 40 St. Rep. 792, 15 N. Y. Supp. 913. If the agreement particularly forbids the solicitation of customers, equity will enforce it. *Samford Dairy Co. v. Sanford*, 114 App. Div. 862, 100 N. Y. Supp. 270. The solicitation of the old customers may be an interference with the good will which was expressly sold with the business. *Goetz v. Ries*, 123 N. Y. Supp. 433.

23. *Kates v. Bok*, 139 App. Div. 640, 124 N. Y. Supp. 297.

24. And see, *infra*, VII-B, Trademarks and tradenames.

25. *Shangold v. Berson*, 125 Misc. 646, 211 N. Y. Supp. 695.

sequent transfer of the business, and the assignee may enforce it the same as the assignor could have done had he retained the business.²⁶ A corporation succeeding to the business may be in a position to enforce the covenant.²⁷ Relief will not be granted unless it appears that the plaintiff has a right to the protection of the covenant.²⁸ To enable a subsequent proprietor to sue in equity for the restraint of a violation of the covenant, it should appear that the covenant, as well as the business, was transferred to him.²⁹ If the earlier business has been abandoned, injunctive relief should not be granted until the business is resumed.³⁰

J. Restrictive covenant as to use of property.

1. In general.

It has long been a common practice, especially in urban communities, to restrict the use of real estate.³¹ Usually this is accomplished when the owner of a tract subdivides it in lots and inserts in the deeds of the separate lots clauses restricting the uses to which the lots may be put, the types of building construction, the location of structures thereon, or other uses deemed to be undesirable in the community. Or, without the aid of a common grantor, adjoining owners may enter into a contract limiting the use which the several owners may make of their respective properties.³² Subject to limitations of considerable importance, the violation of a restriction of this nature may be enforced by injunction.³³ Covenants of this character are for the mutual protection and benefit of the adjoining owners, and

26. *Diamond Match Co. v. Roeber*, 106 N. Y. 473; *Francisco v. Smith*, 143 N. Y. 488; *American Ice Co. v. Meckel*, 109 App. Div. 93, 95 N. Y. Supp. 1060; *Booth v. Seibold*, 37 Misc. 101, 74 N. Y. Supp. 776.

27. *Jochum Bros., Inc. v. Ridgewood Pie Baking Co.*, 210 App. Div. 428, 206 N. Y. Supp. 252.

28. *Weinstein v. Welden*, 160 App. Div. 554, 145 N. Y. Supp. 772, affirmed without opinion, 220 N. Y. 693; *Onondaga Co. Milk Assn. v. Wall*, 17 Hun 494.

29. *Penzes v. Martin*, 83 Misc. 141, 144 N. Y. Supp. 702.

30. *Goldman v. Bootman*, 179 App. Div. 767, 167 N. Y. Supp. 196.

31. **Zoning regulations.**—Many cities are now attempting to accomplish similar results through "zoning" ordinances. The enforcement of these ordinances by injunction is discussed in a later paragraph. See, *infra*, VI-B, Injunction as remedy to enforce penal laws.

32. *Nissen v. McCafferty*, 202 App. Div. 528, 195 N. Y. Supp. 549.

33. *Trustees of Columbia College v. Lynch*, 70 N. Y. 440; *Lattimer v. Livermore*, 72 N. Y. 174; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y.

the consideration therefor lies in the fact that the diminution in the value of a lot burdened with a restriction is partly or wholly offset by the enhancement in its value due to similar restrictions upon all the other lots in the same tract.³⁴

2. Mandatory injunction for removal of structure.

A mandatory injunction requiring the removal of a structure erected in violation of a restrictive covenant is a drastic remedy, and is exercised with caution. But, if one deliberately violates a restriction after a warning from the plaintiff, the court may direct the removal of the unauthorized building.³⁵ But the granting of such an injunction is discretionary, and, if it would be attended with an injustice to the defendant, it will not be granted. Hence, if the defendant has proceeded in good faith believing that the covenant was ineffective, the plaintiff may be remitted to relief by

400; *Booth v. Knipe*, 225 N. Y. 390; *Baumert v. Malkin*, 235 N. Y. 115; *Vogeler v. Alwyn Imp. Corp.* 247 N. Y. 131; *Zipp v. Barker*, 40 App. Div. 1, 57 N. Y. Supp. 569, affirmed without opinion, 166 N. Y. 621; *Silberman v. Uhrlaub*, 116 App. Div. 869, 103 N. Y. Supp. 299; *Thompson v. Diller*, 161 App. Div. 98, 146 N. Y. Supp. 438; *Smith v. Graham*, 161 App. Div. 803, 147 N. Y. Supp. 773, affirmed on opinion below, 217 N. Y. 655; *Goodhue v. Pennell*, 164 App. Div. 821, 150 N. Y. Supp. 435; *Dollard v. Whowell*, 174 App. Div. 403, 160 N. Y. Supp. 544; *Rubel Bros., Inc. v. Dumont Coal & Ice Co.*, 200 App. Div. 135, 192 N. Y. Supp. 705; *Prem v. Radke*, 206 App. Div. 378, 201 N. Y. Supp. 405; *Walker v. McNulty*, 19 Misc. 701, 45 N. Y. Supp. 42; *DeLima v. Mitchell*, 49 Misc. 171, 98 N. Y. Supp. 811; *Adams v. Howell*, 53 Misc. 435, 108 N. Y. Supp. 945; *Perpall v. Gload*, 116 Misc. 571, 190 N. Y. Supp. 417, affirmed, 203 App. Div. 871, 196 N. Y. Supp. 946; *Kempner v. Simon*, 119 Misc. 60, 195 N. Y. Supp. 333; *Paine v. Bergrose Devel.*

Corp., 119 Misc. 796, 198 N. Y. Supp. 311; *Pellegrino v. MacKenzie St. Constr. Co.*, 120 Misc. 89, 197 N. Y. Supp. 699, affirmed, 206 App. Div. 709, 200 N. Y. Supp. 939; *Neidlinger v. New York Association for Poor*, 121 Misc. 276, 200 N. Y. Supp. 852; *Todd v. North Ave. Holding Corp.*, 121 Misc. 301, 201 N. Y. Supp. 31, affirmed, 208 App. Div. 854, 204 N. Y. Supp. 953; *McCain Realty Co., Inc. v. Aylesworth*, 128 Misc. 408, 219 N. Y. Supp. 59.

34. *Coates v. Cullingford*, 147 App. Div. 39, 131 N. Y. Supp. 700; *Barrow v. Richard*, 8 Paige 351.

35. *Lyons v. Edmonds*, 161 App. Div. 20, 146 N. Y. Supp. 277; *Smith v. Graham*, 161 App. Div. 803, 147 N. Y. Supp. 773, affirmed on opinion below, 217 N. Y. 655; *Perpall v. Gload*, 116 Misc. 571, 190 N. Y. Supp. 417, affirmed, 203 App. Div. 871, 196 N. Y. Supp. 946; *Pellegrino v. MacKenzie St. Constr. Co.*, 120 Misc. 89, 197 N. Y. Supp. 699, affirmed, 206 App. Div. 709, 200 N. Y. Supp. 939; *Taylor v. McAdam*, 112 N. Y. Supp. 50.

way of damages.³⁶ A mandatory injunction should not be granted during the pendency of the action.³⁷

3. Oral or implied restrictions.

The owner of land may, by parol contract with the purchasers of successive parcels in respect to the manner of its improvement and occupation, affect the remaining parcels with an equity requiring them also to be occupied in conformity to the general plan, which is binding upon a subsequent purchaser with notice of the fact, although his legal title be absolute and unrestricted.³⁸ The principle is said to rest upon the doctrine of estoppel. Where a party by his declaration or conduct has induced another person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission if the consequence would be to work an injury to another person or to some one claiming under him.³⁹ Thus, if the owner of a tract sells lots thereof under the representation that buildings erected thereon will be built a certain distance from the street, a purchaser of a lot who has constructed his building according to the statements of the vendor may enjoin another, who had knowledge of the conditions under which the lots were sold, from erecting a building within the prohibited area, although the defendant's deed contains no stipulation forbidding it.⁴⁰ Much the same situation arises when the advertisements for the sale of a large number of lots in a subdivision contain statements as to the restrictions to be placed in the deeds, and such restrictions are in some of the deeds but not in others. One whose deed contains such restrictions may have equitable relief against one whose deed does not contain the restrictions, but who took his deed knowing the situation.⁴¹ Or, if at the time a person examines

36. *Forstman v. Joray Holding Co.*, 244 N. Y. 22.

37. *Williams v. Silverman Realty, etc., Co.*, 111 App. Div. 679, 97 N. Y. Supp. 945.

38. *Tallmadge v. East River Bank*, 26 N. Y. 105; *Lewis v. Gollner*, 129 N. Y. 227; *Bimson v. Bultman*, 3 App. Div. 198, 38 N. Y. Supp. 209; *Goodhue v. Pennell*, 164 App. Div. 821, 150 N. Y. Supp. 435; *Nissen v. McCafferty*, 202 App. Div. 523, 195 N. Y. Supp.

549; *Whistler v. Cole*, 81 Misc. 519, 143 N. Y. Supp. 478, affirmed, 162 App. Div. 920, 146 N. Y. Supp. 1118; *Musgrave v. Sherwood*, 23 Hun 669, 60 How. Pr. 339.

39. *Bimson v. Bultman*, 3 App. Div. 198, 38 N. Y. Supp. 209.

40. *Tallmadge v. East River Bank*, 26 N. Y. 105. See also, of similar import, *Nissen v. McCafferty*, 202 App. Div. 528, 195 N. Y. Supp. 549.

41. *Bimson v. Bultman*, 3 App. Div.

certain premises with the view of purchasing the same, the vendor states that the property is restricted and that he cannot build certain structures on his adjoining property, the purchaser having relied on such statements, may restrain the seller from building a structure inconsistent with his statements.⁴²

The principle above referred to cannot be applied as against one having no knowledge of the restrictions on the lots and whose chain of title is free therefrom.⁴³

4. General construction of covenants.

The court will enjoin only those acts which are clearly forbidden by a restrictive covenant.⁴⁴ The covenant will not be extended by implication.⁴⁵ It will be strictly construed against the grantor or the person who formulated the agreement,⁴⁶ and most favorably to the grantee.⁴⁷ Where the language of restrictive covenants is ambiguous, the construction should be adopted which limits restrictions, to the end that owners of property may enjoy its free and unrestricted use.⁴⁸ If there is any ambiguity or uncertainty as to whether the covenant applies, injunctive relief will be refused.⁴⁹ The burden is upon the plaintiff of demonstrating that his construction of the covenant is sustained by the plain and natural interpretation of its language.⁵⁰ But the

198, 38 N. Y. Supp. 209; *Kemper v. Simon*, 119 Misc. 60, 195 N. Y. Supp. 333.

42. *Musgrave v. Sherwood*, 23 Hun 669, 60 How. Pr. 339. But it has been held that in such a case relief cannot be granted in the absence of allegations of fraud or mistake. *Norton v. Ritter*, 121 App. Div. 497, 106 N. Y. Supp. 129.

43. *Schermerhorn v. Bedell*, 163 App. Div. 445, 148 N. Y. Supp. 896, affirmed without opinion, 221 N. Y. 536.

44. *McDonald v. Spang*, 55 Misc. 332.

45. *McDonald v. Spang*, 55 Misc. 332; *Griswold Realty & Holding Corp. v. West End Ave., etc., Corp.*, 125 Misc. 30, 209 N. Y. Supp. 764. "The court may not read into the covenant anything which the parties did not place therein. There was language

enough extant and available to the parties, if actually they had desired to make the restriction more onerous than they did make it by the express provisions thereof." *Pierson v. Rellstab Bros., Inc.*, 219 App. Div. 552, 219 N. Y. Supp. 404, affirmed without opinion, 246 N. Y. 608.

46. *Baumert v. Malkin*, 235 N. Y. 115; *Griswold Realty & Holding Corp. v. West End Ave., etc., Corp.*, 125 Misc. 30, 209 N. Y. Supp. 764.

47. *Booth v. Knipe*, 178 App. Div. 423, 165 N. Y. Supp. 577.

48. *Cook v. Murlin*, 202 App. Div. 552, 195 N. Y. Supp. 793, affirmed without opinion, 236 N. Y. 611.

49. *Smith v. Scoville*, 205 App. Div. 112, 199 N. Y. Supp. 320.

50. *Baumert v. Malkin*, 235 N. Y. 115.

restriction should not be interpreted so as to defeat its avowed purpose.⁵¹

If the covenant is ambiguous, the use of their premises by other owners may, as a matter of practical construction, aid in the interpretation of the covenant; but the rule of practical construction has no application when the meaning of the restriction is plain and certain.⁵²

5. Necessity of damage to plaintiff.

While in an action to restrain the violation of a building covenant it is not necessary for the plaintiff to show that he will sustain actual damage on account of the threatened breach of covenant,⁵³ nevertheless the circumstances that the enforcement of the covenant will be of no substantial benefit to him and will greatly prejudice the defendant may be considered by the court in the exercise of its discretion.⁵⁴ That is to say, the granting of an injunction is, within certain limits, a matter of discretion; and under the circumstances stated the court may justly require the plaintiff to maintain an action at law for his damages.⁵⁵ Thus, injunctive relief for the enforcement of a covenant restricting a territory to private dwellings will be denied when the community has become a business section, for in such a case the enforcement of the covenant would be of serious damage to the defendant, but of no gain to the plaintiff.⁵⁶ Or, if the building covenant is soon to expire by time limitation, the court may feel that the maintenance of the restriction has so little value that

51. *Neidlinger v. New York Association for Poor*, 121 Misc. 276, 200 N. Y. Supp. 852.

52. *Pierson v. Bellstab Bros.*, 219 App. Div. 552, 219 N. Y. Supp. 404, affirmed without opinion, 246 N. Y. 608.

53. *Walker v. McNulty*, 19 Misc. 701, 45 N. Y. Supp. 42; *Iselin v. Flynn*, 90 Misc. 164, 154 N. Y. Supp. 133.

54. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *McClure v. Leaycraft*, 183 N. Y. 36; *Forstman v. Joray Holding Co.*, 244 N. Y. 22; *Goodhue v. Cameron*, 142 App. Div. 470, 127 N. Y. Supp. 120; *Brighton by the Sea, Inc. v. Rivkin*, 201 App.

Div. 726, 195 N. Y. Supp. 198; *Cook v. Murlin*, 202 App. Div. 552, 195 N. Y. Supp. 793, affirmed without opinion, 236 N. Y. 611; *New York Eye & Ear Infirmary v. Chrisomalis*, 120 Misc. 437, 199 N. Y. Supp. 619.

55. *McClure v. Leaycraft*, 183 N. Y. 36; *Forstman v. Joray Holding Co.*, 244 N. Y. 22.

56. *Batchelor v. Hinkle*, 210 N. Y. 243; *Forstman v. Joray Holding Co.*, 244 N. Y. 22; *Schefer v. Ball*, 53 Misc. 448, 104 N. Y. Supp. 1028; *Rubel Bros., Inc. v. Dumont Coal, etc., Co., Inc.*, 111 Misc. 658, 182 N. Y. Supp. 204, reversed on other grounds, 200 App. Div. 135, 192 N. Y. Supp. 705.

it will not be enforced by injunction as against one who would thereby be seriously prejudiced.⁵⁷ There may also be a question of proximity to the unauthorized structure. If the building restriction involves many hundreds of lots, one cannot complain unless he owns a parcel within a reasonable distance of the threatened violation.⁵⁸

If on the other hand, the building restriction is of substantial value to the dominant estate, a court of equity will enforce it even if the result will be a serious injury to the servient estate.⁵⁹ Particularly is this true, when the defendant has proceeded knowingly and in defiance of the restriction.⁶⁰

A notice of an intention to violate the covenant is sufficient to authorize the interference of a court of equity to restrain such violation; and if the intended violation is of a character to be entirely harmless, it devolves upon the defendant to show it.⁶¹

6. Stipulated damages in lieu of injunction.

The fact that the covenant contains a provision for stipulated damages in case of a violation, does not necessarily prohibit injunctive relief.⁶² Where there is a covenant to do or not to do a particular act under a penalty, the covenantor is bound to do or refrain from doing the very thing, unless it appears from the particular language, construed in the light of the surrounding circumstances, that it was the intention of the parties that the payment of the penalty should be the price for non-performance and to be accepted by the covenantee in lieu of performance.⁶³

7. Lack of uniformity in development.

Contracts are not enforced in equity unless they are mutual.⁶⁴ This principle may be applied in a development

57. *Forstman v. Joray Holding Co.*, 244 N. Y. 22.

58. *Bimson v. Bultman*, 3 App. Div. 198, 38 N. Y. Supp. 209.

59. *McClure v. Leaycraft*, 183 N. Y. 36; *Batchelor v. Hinkle*, 210 N. Y. 243; *Smith v. Graham*, 161 App. Div. 803, 147 N. Y. Supp. 773, affirmed on opinion below, 217 N. Y. 655.

60. *Iselin v. Flynn*, 90 Misc. 164, 154 N. Y. Supp. 133.

61. *Lattimer v. Livermore*, 72 N. Y. 174.

62. *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400.

63. *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400.

64. See, *supra*, II-D, Inequity; mutuality.

designed as a restricted community, where one purchaser receives a deed with restrictions, but other purchasers take unrestricted deeds.⁶⁵ Thus, if the promoter of a development reserves in a restrictive deed the right to sell to other purchasers lots free from restrictions, the absence of mutuality may preclude the promoter from securing injunctive relief.⁶⁶ But it is not necessary that the restrictions be uniform in every particular. It is permissible to have a plan that is uniform with respect to some elements and dissimilar with respect to others, and the uniform provisions may then be enforceable.⁶⁷

8. Effect of changed conditions.

Equity may refuse to exercise its injunctive power if the condition of the property by which the premises are surrounded has been so altered that the terms and conditions of the covenant are no longer applicable to the existing state of things.⁶⁸ Although the contract was fair and just when made, the interference of a court of equity will be denied, if subsequent events have made performance by the defendant so onerous that its enforcement will impose great hardship upon him and give little or no benefit to the plaintiff.⁶⁹ If a building restriction is of substantial value to the dominant estate, a court of equity may enforce it even if the result would be a serious injury to the servient estate, but it will not extend its strong arm to harm one party without helping the other.⁷⁰ The prominent illustration of the principle arises when it is sought to enforce a covenant restricting a lot to private residences, and it appears that the surge of business has swept into the territory.⁷¹ In such a case, in-

65. *Davidson v. Dunham*, 152 N. Y. Supp. 16.

66. *Brighton by the Sea, Inc. v. Rivkin*, 201 App. Div. 726, 195 N. Y. Supp. 198.

67. *Neidlinger v. New York Association for Poor*, 121 Misc. 276, 200 N. Y. Supp. 852.

68. *Columbia College v. Thacher*, 87 N. Y. 311, *McClure v. Leaycraft*, 183 N. Y. 36; *Wallack Constr. Co. v. Smalwich Realty Corp.*, 201 App. Div. 133, 194 N. Y. Supp. 381, affirmed, 234 N. Y. 550.

69. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311.

70. *Batchelor v. Hinkle*, 210 N. Y. 243.

71. *Todd v. North Ave. Holding Corp.*, 121 Misc. 301, 201 N. Y. Supp. 31, affirmed, 209 App. Div. 854, 204 N. Y. Supp. 953; *Getchal v. Lawrence*, 121 Misc. 359, 201 N. Y. Supp. 121. See also, *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *Kemper v. Simon*, 119 Misc. 60, 195 N. Y. Supp. 333.

Change outside of section.—A change

junctive relief will be denied;⁷² and the plaintiff will be relegated to an action at law for damages.^{72a} In many cases such a decision is equivalent to denying any relief to the plaintiff, for it may be found that the removal of the restriction will be to his financial gain.⁷³

The court in some cases will refuse to enforce a covenant restricting buildings to a certain distance from the street, where the locality has changed from a residential to a business section;⁷⁴ but, if the restriction has always been observed in the erection of business places, equity may intervene.⁷⁵ The court will not refuse to act if it appears that the set-back restriction is as valuable for business purposes and for residential purposes.⁷⁶

The courts hesitate to refuse relief unless the change in conditions has been so radical that it could not have been within the contemplation of the parties at the creation of the restriction.⁷⁷ Ordinarily the purpose of the covenant was to protect the territory against business invasion. The situation which was feared and which the parties have attempted to avoid, has arisen. The courts are on sounder ground when they can point to some newly created condition which was not within the contemplation of the parties to the original covenant. The use of the abutting street for elevated railroads may furnish such a condition.⁷⁸ But the later cases apparently take the position that a general change of a territory from residential to business purposes

in the neighborhood outside of a residential park does not give business the right to invade the park. *Todd v. North Ave. Holding Corp.*, 121 Misc. 301, 201 N. Y. Supp. 31, affirmed, 209 App. Div. 854, 204 N. Y. Supp. 953.

72. *McClure v. Leaycraft*, 183 N. Y. 36; *Schefer v. Ball*, 53 Misc. 448, 104 N. Y. Supp. 1028; *Rubel Bros., Inc. v. Dumont Coal, etc., Co., Inc.*, 111 Misc. 658, 182 N. Y. Supp. 204, reversed on other grounds, 200 App. Div. 135, 192 N. Y. Supp. 705.

72a. *McClure v. Leaycraft*, 183 N. Y. 36.

73. *McClure v. Leaycraft*, 183 N. Y. 36.

74. *Pappas v. Excelsior Brewing Co.*, 170 App. Div. 692, 156 N. Y. Supp.

845; *Wallack Constr. Co. v. Smalwich Realty Corp.*, 201 App. Div. 133, 194 N. Y. Supp. 381, affirmed, 234 N. Y. 550; *New York Eye & Ear Infirmary v. Chrisomalis*, 120 Misc. 437, 199 N. Y. Supp. 619.

75. *Norrie v. U. S. Realty Co.*, 93 Misc. 326, 157 N. Y. Supp. 91.

76. *Zipp v. Barker*, 40 App. Div. 1, 57 N. Y. Supp. 569, affirmed without opinion, 166 N. Y. 621.

77. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311.

78. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311. But, if at the time of the execution of covenant, a steam railroad occupied a part of the street, an increase in traffic does not constitute a change of conditions with-

is, of itself, sufficient for the court to refuse injunctive relief.⁷⁹

The fact that the time limitation of the covenant is soon to expire and the delay will cause substantial damage to the defendant with no appreciable benefit to the plaintiff, will lead the court to deny the injunction.⁸⁰ The fact that the defendant may have made a considerable investment in the premises in the belief that the restriction was no longer in force, may have weight with the court.⁸¹

9. Effect of violation by plaintiff.

Where similar restrictions cover more than one parcel, an owner who is violating the restriction cannot enjoin his neighbor from doing the prohibited act.⁸² The equitable maxim applied is, "He who comes into equity must come with clean hands."⁸³ Thus, if it appears in a suit to restrain one from violating a covenant limiting the distance structures shall be erected from the street line that the plaintiff, who was bound by a similar covenant, has violated the restriction, no equitable relief will be granted.⁸⁴ But equity will restrain a substantial violation by the defendant, although the plaintiff has been guilty of a technical violation not of substantial nature.⁸⁵

in the rule. *Equitable Life Assur. Soc. v. Brennan*, 30 Abb. N. C. 260, 24 N. Y. Supp. 784.

79. *Batchelor v. Hinkle*, 210 N. Y. 243.

80. *McClure v. Leaycraft*, 183 N. Y. 36; *Forstman v. Joray Holding Co.*, 244 N. Y. 22.

81. *Forstman v. Joray Holding Co.*, 244 N. Y. 22.

82. *Alvord v. Fletcher*, 28 App. Div. 493, 51 N. Y. Supp. 117; *Coates v. Cullinford*, 147 App. Div. 39, 131 N. Y. Supp. 400; *Schermerhorn v. Bedell*, 163 App. Div. 445, 148 N. Y. Supp. 896, affirmed without opinion, 221 N. Y. 536; *Pappas v. Excelsior Brewing Co.*, 170 App. Div. 692, 156 N. Y. Supp. 845; *Gallon v. Hussar*, 172 App. Div. 393, 158 N. Y. Supp. 895; *Wallack Constr. Co. v. Smalwich Realty Corp.*, 201 App. Div. 133, 194 N. Y. Supp. 381, affirmed, 234 N. Y. 550; *Nebeling*

v. Molitor, 111 Misc. 250, 182 N. Y. Supp. 751; *Pellegrino v. MacKenzie St. Constr. Co.*, 120 Misc. 89, 197 N. Y. Supp. 699, affirmed, 206 App. Div. 709, 200 N. Y. Supp. 939. See also, *Seibert v. Ware*, 158 N. Y. Supp. 229.

83. *Wallack Constr. Co. v. Smalwich Realty Corp.*, 201 App. Div. 133, 194 N. Y. Supp. 381, affirmed, 234 N. Y. 550.

84. *Wallack Constr. Co. v. Smalwich Realty Corp.*, 201 App. Div. 133, 194 N. Y. Supp. 381, affirmed, 234 N. Y. 550; *Coates v. Cullinford*, 147 App. Div. 39, 131 N. Y. Supp. 700; *Schermerhorn v. Bedell*, 163 App. Div. 445, 148 N. Y. Supp. 896, affirmed without opinion, 221 N. Y. 536; *Gallon v. Hussar*, 172 App. Div. 393, 158 N. Y. Supp. 895; *Nebeling v. Molitor*, 111 Misc. 250, 182 N. Y. Supp. 751.

85. *Adams v. Howell*, 58 Misc. 435, 108 N. Y. Supp. 945.

10. Effect of violations by others.

The fact that others than the plaintiff have violated a restrictive covenant does not, as a general rule, afford a reason for denying equitable relief to the plaintiff.⁸⁶ In order to have the benefit of restrictive covenants, it is not necessary that the plaintiff should take notice of every violation thereof. He may take no notice of violations not especially offensive to him without losing his right to enforce the restrictions in the case of especially offensive violations.⁸⁷ Yet, if the violations have been so numerous so that the purpose of the original restriction has failed, the change in conditions may justify a refusal of injunctive relief.⁸⁸ The failure to object to other violations brought to the knowledge of the plaintiff, may be considered on the question whether the plaintiff has waived the benefit of the covenant or has acquiesced in the violation in question.⁸⁹

11. Release or waiver of covenant.

If the grantor reserving restrictions as to the use of premises conveyed is the only person interested in their observance, he, or his heirs, assigns or successors, may release the restrictions.⁹⁰ But if, as is usual with modern

86. *Lattimer v. Livermore*, 72 N. Y. 174; *Zipp v. Barker*, 40 App. Div. 1, 57 N. Y. Supp. 569, affirmed without opinion, 166 N. Y. 621; *McDonald v. Spang*, 55 Misc. 332; *Adams v. Howell*, 58 Misc. 435, 108 N. Y. Supp. 945; *Pellegrino v. MacKenzie St. Constr. Co.*, 120 Misc. 89, 197 N. Y. Supp. 699, affirmed, 206 App. Div. 709, 200 N. Y. Supp. 939.

87. *DeLima v. Mitchell*, 49 Misc. 171, 98 N. Y. Supp. 811.

88. See, *supra*, II-J-9, Effect of changed conditions.

89. *Pappas v. Excelsior Brewing Co.*, 170 App. Div. 692, 156 N. Y. Supp. 845.

90. *Cook v. Murkin*, 202 App. Div. 552, 195 N. Y. Supp. 793, affirmed, 236 N. Y. 611.

New deed omitting restrictions.—D. the owner of a tract of land within the city conveyed to his son T. a

corner lot and an adjoining lot by separate deeds each containing a covenant on the part of the grantee not to erect on the property any building other than for residential purposes, nor to reconvey the same for any other purpose. According to a map of the entire tract thereafter made by D. it appeared that the lot lines were not at right angles with the street and after his death his heirs replotted the tract and a new map was made and filed by which the lot lines were straightened. In order to do this and divide the lands among his heirs they, by a quitclaim deed in which T. and his wife joined, conveyed the entire tract to A. who at the same time quitclaimed to T. the two lots which had been conveyed to him by his father, and three other of the lots with other property, and also on the same day A. by various deeds conveyed the

developments, many persons are interested in the continuance of the limitations, a release will be no protection unless it is executed by all who are entitled to complain.⁹¹ The promoter of the development, after selling lots on the representations that the tract will be restricted, will not be permitted to sell other lots without restrictions.⁹²

12. Acquiescence of plaintiff; waiver; laches.

One may not stand by and permit another to incur heavy expenses in the erection of a structure, and then be permitted to assert in a court of equity that a building covenant is violated.⁹³ The plaintiff's remedy in such a case,

balance of the property which had thus been conveyed to him by the heirs of D. to various other of his heirs, but in none of the deeds either to A. or from him to said heirs was there any clause restricting the use or enjoyment of any part of the property. Held, that it was not the intention of the parties to release the restrictions in the prior deed to T. from D. and that a court of equity would enforce the restrictive covenants. *Appel v. Buckbinder*, 82 Misc. 312, 143 N. Y. Supp. 710, reversed on stipulation, 161 App. Div. 910, 145 N. Y. Supp. 1112.

91. *Zipp v. Barker*, 40 App. Div. 1, 57 N. Y. Supp. 569, affirmed without opinion, 166 N. Y. 621; *White v. Moore*, 161 App. Div. 440, 146 N. Y. Supp. 593, affirming, 73 Misc. 96, 132 N. Y. Supp. 441; *Equitable Life Assur. Soc. v. Brennan*, 30 Abb. N. C. 260, 24 N. Y. Supp. 784.

Park on map of subdivision.—An owner of a tract of land divided it into building lots, every one of which fronted on proposed streets, and a large number of which faced a square plot marked "Park" on the map filed by him. After the conveyance of all the lots by reference to the map, the "Park" was conveyed, and the grantee attempted to exclude the grantees of the lots from the use thereof. Thereupon a suit was brought by the

grantees of the lots to enjoin the grantee of the "Park" from interfering with its public use. Held, that a judgment for the plaintiff should be affirmed; that as to the grantees of the lots there was an implied covenant of easement in the "Park;" that the grantor had no power to revoke the right of the grantees to use the "Park" without their consent. *White v. Moore*, 161 App. Div. 400, 146 N. Y. Supp. 593.

92. *Rochester Yacht Club Co. v. Rochester Boat Works*, 126 Misc. 309, 212 N. Y. Supp. 572.

93. *Flint v. Charman*, 6 App. Div. 121, 39 N. Y. Supp. 892; *Pellegrino v. MacKenzie St. Constr. Co.*, 120 Misc. 89, 197 N. Y. Supp. 699, affirmed, 206 App. Div. 709, 200 N. Y. Supp. 939.

Burden of proof.—The defendant has the burden of proving that the plaintiff has been guilty of laches. *Thompson v. Diller*, 161 App. Div. 98, 146 N. Y. Supp. 438.

Delay of twenty-two days.—The plaintiff did not lose his right to maintain the suit by a delay of twenty-two days after the excavation had been started by the defendant. *Thompson v. Diller*, 161 App. Div. 98, 146 N. Y. Supp. 438.

Misrepresentation by defendant.—If the plaintiff fails to take action promptly because of misrepresentations by the defendant as to whether the

if any, is an action at law for damages. It would be inequitable to grant injunctive relief to an owner who has abetted or consented to a violation of a covenant.⁹⁴ One who acquiesces in a violation, or fails to remonstrate when the work is started, has no equitable standing.⁹⁵ Clearly, therefore, one who expressly consents to the violation can have no relief in equity.⁹⁶

The consent to a violation of one covenant is not to be construed as a consent to the violation of other distinct covenants.⁹⁷ A person entitled to enforce a restrictive covenant is not obliged to sue all of the persons violating the covenant at once. He may take no notice of violations which are not especially offensive to him without losing his right to enforce the covenant in the case of especially offensive violations thereof.⁹⁸

13. By whom enforced.

As a general rule covenants restricting the use of land run with the land, and hence the successors of the grantors, or other persons purchasing lots, may, so long as they are interested in the observance of the restrictions, maintain a suit for their enforcement.⁹⁹ A covenant regulating the buildings to be erected in a subdivision may be enforced by a neighboring owner, although there is no privity of covenant between the parties.¹ A covenant of this character is

proposed improvement violated the restriction, the plaintiff is not charged with laches. *Pellegrino v. MacKenzie St. Constr. Co.*, 120 Misc. 89, 197 N. Y. Supp. 699, affirmed, 206 App. Div. 709, 200 N. Y. Supp. 939.

94. *Flint v. Charman*, 6 App. Div. 121, 39 N. Y. Supp. 892.

95. *Flint v. Charman*, 6 App. Div. 121, 39 N. Y. Supp. 892; *Musgrave v. Sherwood*, 23 Hun 669, 60 How. Pr. 339.

96. *Woodhaven Junction Land Co. v. Solly*, 148 N. Y. 42.

97. *Lattimer v. Livermore*, 72 N. Y. 174.

98. *McCain Realty Co. v. Aylesworth*, 128 Misc. 408, 219 N. Y. Supp. 59; *Levy v. Halcyon Casino Hotel Co.*, 45 Misc. 289, 92 N. Y. Supp. 231.

99. *Lattimer v. Livermore*, 72 N. Y. 174; *Booth v. Knipe*, 225 N. Y. 390; *Vogeler v. Alwyn Imp. Corp.*, 247 N. Y. 131; *Prem v. Radke*, 206 App. Div. 378, 201 N. Y. Supp. 405; *Neidlinger v. New York Association for Poor*, 121 Misc. 276, 200 N. Y. Supp. 852; *Village of Watertown v. Cowen*, 4 Paige 510.

1. *Booth v. Knipe*, 225 N. Y. 390; *Vogeler v. Alwyn Imp. Corp.*, 247 N. Y. 131; *Silberman v. Whilaub*, 116 App. Div. 869, 103 N. Y. Supp. 299; *Coates v. Cullingford*, 147 App. Div. 39, 131 N. Y. Supp. 700; *Booth v. Knipe*, 178 App. Div. 423, 165 N. Y. Supp. 577; *Prem v. Radke*, 206 App. Div. 378, 201 N. Y. Supp. 405; *McDonald v. Spang*, 55 Misc. 332; *Bouvier v. Segardi*, 112 Misc. 689, 183 N. Y.

deemed for the common benefit of all of the successive grantees of the tract, and hence any owner injured thereby may sue for an injunction.² The violation of a restrictive covenant creating a negative easement may be restrained at the suit of one who owns property for whose benefit the restriction was established irrespective of whether there was privity either of estate or of contract between the parties or whether an action at law was maintainable.³ A life estate in one of the protected parcels is sufficient for the maintenance of the action.⁴

There may, of course, be cases where the covenant does not run with the land, but is designed for the protection of the original parties only.⁵ Whether a covenant restricting the use of premises is for the benefit of the grantor personally or for the benefit of successive lot owners, is a question of intention, which is to be gathered, not merely from the language of the deed, but from all of the surrounding circumstances.⁶ An affirmative covenant that the grantee of a lot will erect thereon a residence of a described type within a specified time does not run with the land, and cannot be enforced by the grantee of another lot.⁷

14. Against whom enforced.

As a general rule, a covenant restricting the use of premises runs with the land, and hence it may be enforced against subsequent grantees of the restricted lots.⁸ A grantee may

Supp. 814; *Neidlinger v. New York Association for Poor*, 121 Misc. 276, 200 N. Y. Supp. 852; *Brouwer v. Jones*, 23 Barb. 153; *Barrow v. Richard*, 8 Paige 351.

2. *Prem v. Radke*, 206 App. Div. 378, 201 N. Y. Supp. 405; *Bouvier v. Segardi*, 112 Misc. 689, 183 N. Y. Supp. 814.

3. *Silberman v. Whilaub*, 116 App. Div. 869, 103 N. Y. Supp. 299.

4. *Brouwer v. Jones*, 23 Barb. 153.

5. *McLean v. Woolworth Co.*, 204 App. Div. 118, 198 N. Y. Supp. 467, affirmed, 236 N. Y. 613.

6. *Booth v. Knipe*, 225 N. Y. 390.

7. *Booth v. Knipe*, 178 App. Div. 423, 165 N. Y. Supp. 577.

8. *Trustees of Columbia College v.*

Thacher, 87 N. Y. 311; *Vogeler v. Alwyn Imp. Co.*, 247 N. Y. 131; *Silberman v. Uhrlaub*, 116 App. Div. 869, 103 N. Y. Supp. 299; *Thompson v. Diller*, 161 App. Div. 98, 146 N. Y. Supp. 438; *Perpall v. Gload*, 116 Misc. 571, 190 N. Y. Supp. 417, affirmed, 203 App. Div. 871, 196 N. Y. Supp. 946; *Kemper v. Simon*, 119 Misc. 60, 195 N. Y. Supp. 333; *Neidlinger v. New York Association for Poor*, 121 Misc. 276, 200 N. Y. Supp. 852; *Equitable Life Assur. Soc. v. Brennan*, 30 Abb. N. C. 260, 24 N. Y. Supp. 784; *Brouwer v. Jones*, 23 Barb. 153; *Tallmadge v. East River Bank*, 9 Super. Ct. (2 Duer) 614, affirmed, 26 N. Y. 105; *Birdsall v. Tiemann*, 12 How. Pr. 551.

A railroad may be restrained from

take title free from restrictive covenants, if there are none in his chain of title;⁹ but, if his deed is expressly subject to restrictions,¹⁰ or if he has actual knowledge of restrictions affecting the use of the premises,¹¹ he may be enjoined although there is no privity of contract between him and the plaintiff. Although the defendant's deed contains no restrictions, the early deeds in his chain of title may contain a covenant which runs with the land and is binding upon him.¹² Deeds executed by the original grantor prior to the conveyance under which the defendant has title, may charge the defendant with notice of restrictions on the use of the premises.¹³

15. Dwellings only.

A covenant that a lot shall have but one dwelling thereon does not limit the number of families that may occupy the structure.¹⁴ The dwelling may, therefore, be altered so that it becomes an apartment house.¹⁵ But the owner of a lot cannot erect a hospital thereon.¹⁶

constructing its road through a restricted tract. *Flynn v. New York, etc., R. Co.*, 139 App. Div. 199, 123 N. Y. Supp. 759.

9. *Schermerhorn v. Bedell*, 163 App. Div. 445, 148 N. Y. Supp. 896, affirmed without opinion, 221 N. Y. 536; *Knapp v. Hall*, 43 St. Rep. 95, 17 N. Y. Supp. 437. A purchaser of a lot in a subdivision is not required to search all of the titles growing out of the division of the tract; and, if his title is free from restrictions, he is not bound by restrictions affecting the subdivision of which he had no notice. *Schermerhorn v. Bedell*, 163 App. Div. 445, 148 N. Y. Supp. 896, affirmed without opinion, 221 N. Y. 536.

10. *Thompson v. Diller*, 161 App. Div. 98, 146 N. Y. Supp. 438; *Perpall v. Gload*, 116 Misc. 571, 190 N. Y. Supp. 417, affirmed, 203 App. Div. 371, 196 N. Y. Supp. 946.

11. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *Lewis v. Gollner*, 129 N. Y. 227; *Bimson v. Bultman*, 3 App. Div. 198, 38 N. Y. Supp.

209; *Goodhue v. Pennell*, 164 App. Div. 821, 150 N. Y. Supp. 435; *Rubel Bros., Inc. v. Dumont Coal & Ice Co.*, 200 App. Div. 135, 192 N. Y. Supp. 705; *Kemper v. Simon*, 119 Misc. 60, 195 N. Y. Supp. 333; *Knapp v. Hall*, 43 St. Rep. 95, 17 N. Y. Supp. 437.

12. *Silberman v. Uhrlaub*, 116 App. Div. 869, 103 N. Y. Supp. 299; *Birdsall v. Tiemann*, 12 How. Pr. 551.

13. *Goodhue v. Pennell*, 164 App. Div. 821, 150 N. Y. Supp. 435; *Whistler v. Cole*, 81 Misc. 519, 143 N. Y. Supp. 478, affirmed, 162 App. Div. 920, 146 N. Y. Supp. 1118.

14. *Pierson v. Bellstab Bros.*, 219 App. Div. 552, 219 N. Y. Supp. 404, affirmed without opinion, 246 N. Y. 608.

15. *Pierson v. Bellstab Bros.*, 219 App. Div. 552, 219 N. Y. Supp. 404, affirmed without opinion, 246 N. Y. 608.

16. *Smith v. Graham*, 161 App. Div. 803, 147 N. Y. Supp. 773, affirmed on opinion below, 217 N. Y. 655.

16. Private dwellings only.

In order to preserve the residential character of a development, the buildings to be erected may be restricted to private residences. Such a restriction may be enforced by injunction.¹⁷ Business structures may be kept from a community so restricted.¹⁸ A restriction of "private dwellings" is much more drastic than a restriction of "dwellings."¹⁹ A private dwelling should not contain apartments for rent in addition to the living quarters of the family.²⁰ Changing a dwelling into a two family house may create sufficient ground for an injunction.²¹ Likewise, the court may enjoin the use of the premises for a private hospital,²² or a recreation home for children.²³

17. *Levy v. Schreyer*, 177 N. Y. 293; *Flynn v. New York, etc., R. Co.*, 139 App. Div. 199, 123 N. Y. Supp. 759; *Thompson v. Diller*, 161 App. Div. 98, 146 N. Y. Supp. 438; *Paine v. Bergrose Devel. Corp.*, 119 Misc. 796, 198 N. Y. Supp. 311; *Neidlinger v. New York Association for Poor*, 121 Misc. 276, 200 N. Y. Supp. 852; *Todd v. North Ave. Holding Corp.*, 121 Misc. 301, 201 N. Y. Supp. 31, affirmed, 209 App. Div. 854, 204 N. Y. Supp. 953; *Getchal v. Lawrence*, 121 Misc. 359, 201 N. Y. Supp. 121. See also, *Forstmann v. Joray Holding Co.*, 244 N. Y. 22.

Restriction on part of lot.—A covenant restricting the buildings to be erected on a lot, does not apply to an adjoining lot which was acquired without restrictions. *Goodhue v. Cameron*, 142 App. Div. 470, 127 N. Y. Supp. 120.

Absence of signs.—The fact that no signs are placed on the premises to indicate its use, does not establish that the covenant is not breached. *Neidlinger v. New York Association for Poor*, 121 Misc. 276, 200 N. Y. Supp. 852.

Complaint in disjunctive.—Where, in a suit to enjoin the construction and maintenance of buildings in violation of a restrictive covenant, which provided that said land "shall be used and occupied solely for the purpose of a private dwelling and a private

stable or garage, to be used for and in connection with such dwelling house," and allegation of the complaint that the defendants have "constructed certain sheds or outhouses not permitted by and in violation of the terms of the contract * * * and in violation of the covenants referred to in the deed of the said premises," is in the disjunctive and a demurrer thereto should be sustained. *Heyson v. Lichtenstein*, 157 App. Div. 483, 142 N. Y. Supp. 596.

18. *Goodhue v. Pennell*, 164 App. Div. 821, 150 N. Y. Supp. 435; *Kempner v. Simon*, 119 Misc. 60, 195 N. Y. Supp. 333; *Todd v. North Ave. Holding Corp.*, 121 Misc. 301, 201 N. Y. Supp. 31, affirmed, 209 App. Div. 854, 204 N. Y. Supp. 953.

19. **An apartment house** is clearly forbidden by a covenant against any building except a detached dwelling house for one family only. *Dollard v. Whowell*, 174 App. Div. 403, 160 N. Y. Supp. 544.

20. *Levy v. Schreyer*, 177 N. Y. 293.

21. *Paine v. Bergrose Devel. Co.*, 119 Misc. 796, 198 N. Y. Supp. 311.

22. *Smith v. Graham*, 161 App. Div. 803, 147 N. Y. Supp. 773, affirmed on opinion below, 217 N. Y. 655.

23. *Neidlinger v. New York Association for Poor*, 121 Misc. 276, 200 N. Y. Supp. 852.

The restriction may forbid the use of the building for any purpose other than as a private dwelling, although the form of the structure complies with the covenant.²⁴ Thus, the use of a private residence as a music school may be enjoined.²⁵ But a physician or attorney may have his office in the building without destroying its residential character.²⁶ A physician may also lodge and treat a few patients at his home.²⁷ One may keep a few boarders without the peril of an injunction.²⁸ A store in a part of the dwelling may, however, receive the condemnation of the courts.²⁹ Likewise, the use of a part of the dwelling for a dressmaking establishment may be restrained.³⁰

The construction of a railroad through the restricted territory may be enjoined, until the company has condemned the rights of all of the owners legally interested in the restrictions.³¹

17. All structures forbidden.

Where the agreement is based upon a good consideration, the owner of a parcel of land may covenant not to erect a building or structure thereon; and a threatened violation may be restrained by injunction.³² The owner of a parcel so restricted may be prohibited from erecting on an adjoining lot a structure which will extend on the restricted lot.³³ A lane or right of way may be thus protected from the encroachment of adjoining owners.³⁴ If the map of a development shows a "park," owners of adjoin-

24. *Baumert v. Malkin*, 235 N. Y. 115.

25. *Baumert v. Malkin*, 235 N. Y. 115.

26. Office of real estate agent in his home.—See *Schnibe v. Glenz*, 245 N. Y. 388.

27. *Booth v. Knipe*, 178 App. Div. 423, 165 N. Y. Supp. 577.

28. *Gallon v. Hussar*, 172 App. Div. 393, 158 N. Y. Supp. 895; *Smith v. Scoville*, 205 App. Div. 112, 199 N. Y. Supp. 320.

29. *Gallon v. Hussar*, 172 App. Div. 393, 158 N. Y. Supp. 895.

30. *Iselin v. Flynn*, 90 Misc. 164, 154 N. Y. Supp. 133.

31. *Flynn v. New York, etc., R. Co.*, 139 App. Div. 199, 123 N. Y. Supp. 759.

32. *Smith v. Graham*, 161 App. Div. 803, 147 N. Y. Supp. 773, affirmed on opinion below, 217 N. Y. 655; *Hills v. Miller*, 3 Paige 254; *Village of Watertown v. Cowen*, 4 Paige 510.

33. *Smith v. Graham*, 161 App. Div. 803, 147 N. Y. Supp. 773, affirmed on opinion below, 217 N. Y. 655.

34. *Dexter v. Beard*, 25 St. Rep. 664, 7 N. Y. Supp. 11, 2 Silv. Sup. Ct. 106, affirmed, 130 N. Y. 549.

ing premises may acquire an implied easement therein which the courts will protect by injunction.³⁵

18. Offensive business.

A conveyance may forbid the erection or maintenance of any nuisance on certain premises.³⁶ Such a covenant may be enforced by injunction;³⁷ in fact, the maintenance of nuisance may be enjoined although there is no covenant forbidding it.³⁸ A covenant may, however, restrain a class of structures or a line of business, although it might not technically constitute a nuisance.³⁹ An injunction may be granted to restrain the violation of a covenant forbidding any factory trade or business which might be offensive to neighboring owners.⁴⁰ A covenant forbidding the maintenance of a noxious or objectionable business is not violated by the erection of a store.⁴¹ Before the adoption of the Eighteenth Amendment to the Federal Constitution, it was frequent practice to insert in a deed a clause forbidding the sale of intoxicants on the premises. The violation of such a clause was sufficient ground for an injunction.⁴²

35. *White v. Moore*, 161 App. Div. 440, 146 N. Y. Supp. 593, affirming, 73 Misc. 96, 132 N. Y. Supp. 441.

36. *Birdsall v. Tiemann*, 12 How. Pr. 551.

Contract as to use of particular premises.—A complaint alleging in substance that the owner of a building adjoining that of the plaintiff agreed that he would not rent the same for use in the clothing business in which the plaintiff was engaged, and that if he did so he should "be liable * * * in damages and breach of contract," and that he violated said agreement by renting the premises to persons engaged in the clothing business, who took the lease with knowledge of the agreement, states a cause of action for equitable relief by way of injunction, there being allegations showing that the plaintiff's remedy at law is inadequate. *Feinstein v. Jacobson*, 161 App. Div. 121, 146 N. Y. Supp. 525.

Coal business.—A covenant that a certain parcel of land shall not be used

for the coal and ice business, may be enforced by injunction. *Rubel Bros. v. Dumont Coal & Ice Co.*, 200 App. Div. 135, 192 N. Y. Supp. 705.

37. A babies' hospital may be a nuisance.—*Gifford v. Babies' Hospital*, 21 Abb. N. C. 159, 17 St. Rep. 886, 1 N. Y. Supp. 448.

38. See Chapter on Nuisance, 3 *Fiero on Particular Actions and Proceedings*, page 2454.

39. Steam engine.—The erection of a steam engine on the premises may be enjoined when it violates a restrictive covenant. *Birdsall v. Tiemann*, 12 How. Pr. 551.

40. *Barrow v. Richard*, 8 Paige 351.

41. *Gallow v. Hussar*, 172 App. Div. 393, 158 N. Y. Supp. 895.

42. *Woodhaven Junction Land Co. v. Solly*, 148 N. Y. 42; *Silberman v. Uhrlaub*, 116 App. Div. 869, 103 N. Y. Supp. 299.

Restaurant and drinking saloon.—Where the deeds of certain lots to plaintiff and defendant from a common

19. Apartment houses.

A covenant forbidding the erection of an "apartment house" on certain premises, made many years ago before the advent of "apartment hotels," will not be extended by construction so as to include the latter.⁴³

20. Distance of structure from street line.

In order to preserve the residential character of a neighborhood, or to afford light and air to the occupants, the deeds of a real estate development may contain restrictions requiring the buildings to be erected a prescribed distance, at least, from the street line. A violation of a covenant of this nature is sufficient ground for injunctive relief.⁴⁴ Such a covenant may be violated by the extension over the building line of a bay or show window,⁴⁵ or a porch,⁴⁶ or a sun parlor extension.⁴⁷ But steps and ornamental projections

owner contain covenants that the premises shall not be used or occupied for a "bar-room, lager beer saloon, restaurant, ale house, liquor saloon, store, warehouse, or any erections known as nuisances, or any noxious or dangerous use, purpose, trade, business or establishment, or for any business purpose whatsoever," the use of a building on defendant's land solely for a restaurant and drinking saloon is a violation of such covenant and may be enjoined. *DeLima v. Mitchell*, 49 Misc. 171, 98 N. Y. Supp. 811.

43. *Griswold Realty & Holding Corp. v. West End Ave., etc., Corp.*, 125 Misc. 30, 209 N. Y. Supp. 764.

44. *Lattimer v. Livermore*, 72 N. Y. 174; *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400; *Bauer v. Bribel*, 2 App. Div. 80, 73 St. Rep. 307, 37 N. Y. Supp. 609; *Zipp v. Barker*, 40 App. Div. 1, 57 N. Y. Supp. 569, affirmed without opinion, 166 N. Y. 621; *Coates v. Cullingford*, 147 App. Div. 39, 131 N. Y. Supp. 700; *Lyons v. Edmonds*, 161 App. Div. 20, 146 N. Y. Supp. 277; *Thompson v. Diller*, 161 App. Div. 98, 146 N. Y. Supp. 438; *Nisson v. McCafferty*, 202 App. Div. 528, 195 N. Y. Supp. 549; *Whistler v.*

Cole, 81 Misc. 519, 143 N. Y. Supp. 478, affirmed, 162 App. Div. 920, 146 N. Y. Supp. 1118; *Norrie v. U. S. Realty Co.*, 93 Misc. 326, 157 N. Y. Supp. 91; *Bouvier v. Segardi*, 112 Misc. 689, 183 N. Y. Supp. 814; *Pellegrino v. MacKenzie Street Constr. Corp.*, 120 Misc. 89, 197 N. Y. Supp. 699, affirmed, 206 App. Div. 709, 200 N. Y. Supp. 939; *McCain Realty Co., Inc. v. Aylesworth*, 128 Misc. 408, 219 N. Y. Supp. 59; *Taylor v. McAdam*, 112 N. Y. Supp. 50; *Tallmadge v. East River Bank*, 9 N. Y., Super. (2 Duer) 614, affirmed, 26 N. Y. 105.

45. *Williams v. Silverman Realty Co.*, 111 App. Div. 679, 97 N. Y. Supp. 945; *Wallack Constr. Co. v. Smalwich Realty Corp.*, 201 App. Div. 133, 194 N. Y. Supp. 381, affirmed, 234 N. Y. 550; *Bouvier v. Segardi*, 112 Misc. 689, 183 N. Y. Supp. 814.

46. *Williams v. Silverman Realty, etc., Co.*, 111 App. Div. 679, 97 N. Y. Supp. 945; *Schermerhorn v. Bedell*, 163 App. Div. 445, 148 N. Y. Supp. 896, affirmed without opinion, 221 N. Y. 536.

47. *McCann Realty Co., v. Aylesworth*, 128 Misc. 408, 219 N. Y. Supp. 59.

may be maintained without an infringement of the covenant.⁴⁸

21. Barns; stables; garages.

The maintenance of public stables or garages on a lot, or the restriction of private barns or garages to a certain part of a lot, may be enforced by injunction.⁴⁹ A portable metal garage, situated a few feet back of the house and connected with it only by strips of wood, violates a clause in a deed providing that no stable or garage should be built on the lot.⁵⁰ The fact that a garage, placed on a lot in violation of a building restriction, was portable, so that the violation might be only temporary, does not prevent an injunction to restrain the violation.⁵¹ A restriction in a deed executed prior to the popularity of motor vehicles, forbidding the erection of a barn or stable on a specified part of a lot, may be construed so as to limit the erection of a garage in the prohibited territory.⁵²

K. Leases.

1. In general.

Ordinarily, summary proceedings for the dispossession of a tenant, or an action at law for damages, will afford an adequate remedy for a controversy between a landlord and his tenant.⁵³ As a general rule, neither the landlord nor the tenant will be restrained from violating the contract.⁵⁴ The tenant will not be restrained from vacating the premises before the expiration of the term.⁵⁵ A lessee will not be restrained from violating a provision forbidding him from

48. *Adams v. Howell*, 58 Misc. 435, 108 N. Y. Supp. 945.

49. *Equitable Life Assur. Soc. v. Brennan*, 30 Abb. N. C. 260, 24 N. Y. Supp. 784. And see, *McKennell v. Guaranty Trust Co.*, 130 Misc. 400, 223 N. Y. Supp. 598.

50. *Seibert v. Ware*, 158 N. Y. Supp. 229.

51. *Seibert v. Ware*, 158 N. Y. Supp. 229.

52. *Perpall v. Gload*, 116 Misc. 571, 190 N. Y. Supp. 417, affirmed, 203 App. Div. 871, 196 N. Y. Supp. 946.

53. *Gerken v. Hall*, 65 App. Div. 16, 72 N. Y. Supp. 1104; *Kienle v. Grets*

Realty Co., 133 App. Div. 391, 117 N. Y. Supp. 500; *Koenig v. Eagle Waist Co.*, 176 App. Div. 726, 163 N. Y. Supp. 1019; *Twenty-fifth St. Realty Co. v. Wachtel*, 193 App. Div. 76, 183 N. Y. Supp. 332; *Merl, Inc. v. Richfield-Jenks*, 125 Misc. 318, 209 N. Y. Supp. 530; *Stirn v. Nash*, 12 N. Y. Supp. 431, 19 N. Y. Civ. Proc. 184; *Gillilan v. Norton*, 29 Super. Ct. (6 Rob.) 546, 33 How. Pr. 373.

54. *Burdick v. Fuller*, 199 App. Div. 94, 191 N. Y. Supp. 442.

55. *Burdick v. Fuller*, 199 App. Div. 94, 191 N. Y. Supp. 442.

engaging in the business for which the premises were leased at any place other than the demised premises.⁵⁶

On the other hand, equity may assume jurisdiction when it is shown that there is no adequate remedy at law.⁵⁷ Thus, the tenant may be protected in his enjoyment of the premises, and the landlord may be protected by injunctive relief from an improper use of the demised premises, an unauthorized assignment of the lease or subletting of the property, or the commission of acts which would result in waste.⁵⁸ Or, if the tenant persists in violating a clause of the lease permitting the landlord to place on the premises a "for rent," or "for sale" sign, injunctive relief may be proper.⁵⁹ The landlord may be restrained from selling the leased premises without giving the tenant the first opportunity to purchase the same, where the lease gives the tenant this option.⁶⁰

2. Enjoyment of premises by tenant.

An injunction may be granted to prevent the landlord from interfering with the tenant's enjoyment of the demised premises or the appurtenances thereto.⁶¹ The remedy at

56. *Merl., Inc. v. Richfield-Jenks, Inc.*, 125 Misc. 318, 209 N. Y. Supp. 530.

57. *Backes v. Curran*, 69 App. Div. 188, 74 N. Y. Supp. 723; *United Cigar Stores v. Levin*, 198 App. Div. 268, 190 N. Y. Supp. 469; *Meers v. Munsch-Protzmann Co.*, 217 App. Div. 541, 217 N. Y. Supp. 256; *Traitel Marble Co. v. Chase*, 35 Misc. 233, 71 N. Y. Supp. 628; *McDonald v. O'Hara*, 117 Misc. 517, 192 N. Y. Supp. 545; *Spencer & Co. v. Briggs*, 119 Misc. 183, 196 N. Y. Supp. 183; *Vernam v. Palmer*, 5 N. Y. Supp. 71; *Cooley v. Cummings*, 16 St. Rep. 947, 1 N. Y. Supp. 631.

58. See the following paragraphs.

59. *Spencer & Co. v. Briggs*, 119 Misc. 183, 196 N. Y. Supp. 183.

60. *New Atlantic Garden, Inc. v. Atlantic, G. R. Corp.*, 201 App. Div. 404, 194 N. Y. Supp. 34, affirmed, 237 N. Y. 540.

61. *Greenblatt v. Zimmerman*, 132 App. Div. 283, 117 N. Y. Supp. 18; *Hessler v. Schafer*, 20 Misc. 645, 46

N. Y. Supp. 1076; *Proskey v. Cumberland Realty Co.*, 35 Misc. 50, 70 N. Y. Supp. 1125; *Traitel Marble Co. v. Chase*, 35 Misc. 233, 71 N. Y. Supp. 628; *Bauer v. Schwartz*, 122 Misc. 630, 203 N. Y. Supp. 507, affirmed, 209 App. Div. 827, 204 N. Y. Supp. 893; *Horton v. Carhart*, 14 St. Rep. 546; *Cooley v. Cummings*, 16 St. Rep. 947, 1 N. Y. Supp. 631; *Vernam v. Palmer*, 5 N. Y. Supp. 71; *Evans v. Prince's Bay Oyster Co.*, 154 N. Y. Supp. 279, affirmed, 170 App. Div. 909, 154 N. Y. Supp. 1120.

Lease to commence in future.—The action may be maintained by a tenant whose lease has not yet commenced. *Evans v. Prince's Bay Oyster Co.*, 154 N. Y. Supp. 279, affirmed, 170 App. Div. 909, 154 N. Y. Supp. 1120.

Bill-board on roof.—One of five tenants of a one-story building designed for business purposes only, holding under a lease describing the premises occupied by him as "the store and basement," and not mentioning the roof, has no rights in the roof

law is deemed inadequate, where the acts of the landlord permanently disturb the tenant's enjoyment of the premises.⁶² The multiplicity of suits which may arise from daily violations of the lease, may also be a matter of concern to a court of equity.⁶³ The fact that the landlord is willing to pay the damage sustained by the tenant, does not necessarily cause a denial of equitable relief.⁶⁴ A threatened forcible eviction may be restrained by injunctive process.⁶⁵ A landlord will not be permitted to interfere with easements of light and air which have been granted to a tenant.⁶⁶ A tenant is entitled to ingress and egress at all reasonable hours, and may be entitled to gas, electric and water supply, and to elevator service; and such rights may be protected by injunction.⁶⁷ Extensive alterations or improvements to the premises may be restrained, if they will cause irreparable damage to a tenant.⁶⁸ But, where the interference is but temporary, and is necessary to carry out an improve-

over the premises occupied by him, where access is possible only by a ladder from a hallway in the center of the building, which is in the exclusive control of the landlord. Hence, the tenant is not entitled to an injunction restraining the landlord and a bill-posting company to which the landlord had previously leased the roof from erecting signs thereon. *Peats Co. v. Bradley*, 166 App. Div. 267, 151 N. Y. Supp. 602.

Effect of expiration of lease.—If the lease expires before the issues are brought to trial, an injunction will not be granted, but in lieu thereof damages will be allowed. *Greenblatt v. Zimmerman*, 132 App. Div. 283, 117 N. Y. Supp. 18.

62. *Vernam v. Palmer*, 5 N. Y. Supp. 71.

63. *Cooley v. Cummings*, 16 St. Rep. 947, 1 N. Y. Supp. 631.

64. *Horton v. Carhart*, 14 St. Rep. 546.

65. *Miers v. Munsch-Protzmann Co.*, 217 App. Div. 541, 217 N. Y. Supp. 256; *Internation Garden Club v. Hennessy*, 104 Misc. 141, 172 N. Y. Supp. 8.

66. *Stevens v. Salomon*, 39 Misc. 159, 79 N. Y. Supp. 136; *Bauer v. Schwartz*, 122 Misc. 630, 203 N. Y. Supp. 507, affirmed, 209 App. Div. 827, 204 N. Y. Supp. 893.

67. *Barbara Hope Theatres, Inc. v. Kaplan & Co., Inc.*, 223 App. Div. 83, 227 N. Y. Supp. 22; *Proskey v. Cumberland Realty Co.*, 35 Misc. 50, 70 N. Y. Supp. 1125.

Dispute as to power.—While a tenant is in lawful possession of premises under a lease by the terms of which the landlord is to furnish his power, the landlord will be enjoined from cutting off the power notwithstanding the fact that differences have arisen between the parties in regard to the payment of rent. *Traitel Marble Co. v. Chase*, 35 Misc. 233, 71 N. Y. Supp. 628.

68. *Backes v. Curran*, 69 App. Div. 198, 74 N. Y. Supp. 723; *Benedict v. International Banking Corp.* 88 App. Div. 488, 85 N. Y. Supp. 188; *United Cigar Stores Co. v. Levin*, 198 App. Div. 268, 190 N. Y. Supp. 469; *Hessler v. Schafer*, 20 Misc. 645, 46 N. Y. Supp. 1076; *Proskey v. Cumberland Realty Co.*, 35 Misc. 50, 70 N. Y. Supp. 1125.

ment, equitable relief may be denied.⁶⁹ And, of course, the owner may make any alterations in his buildings, so long as there is no interference with the particular premises leased to a tenant.⁷⁰

A tenant who is excluded from the premises may have a remedy in equity, if the relief at law is inadequate; if legal relief is adequate, equitable relief will not be granted.⁷¹

3. Use by landlord of part of premises not leased.

The landlord may by a covenant in a lease restrict the use which shall be made of other premises owned by the landlord. An offensive or dangerous business may thus be avoided.⁷² Or the tenant may thus properly protect his business from a competing business of similar nature. A breach of such a covenant may be restrained by injunction.⁷³ A competing tenant charged with knowledge of the covenant in the plaintiff's lease, may be joined as a party defendant.⁷⁴

4. Improper use of premises by tenant.

Where a covenant in a lease restricts the tenant from using the premises except for a specified use, an injunction may be granted forbidding the use for any other purpose.⁷⁵ Or, if a particular use is prohibited, the restriction may be enforced by injunction.⁷⁶ The covenant may run with the

69. *Gerken v. Hall*, 65 App. Div. 16, 72 N. Y. Supp. 1104.

70. *Haskins v. George A. Fuller Co.*, 36 Misc. 38, 72 N. Y. Supp. 440.

71. *Goldman v. Corn*, 111 App. Div. 674, 97 N. Y. Supp. 926; *Koenig v. Eagle Waist Co.*, 176 App. Div. 726, 163 N. Y. Supp. 1019.

72. See *Neiman v. Butler*, 46 St. Rep. 928, 19 N. Y. Supp. 403.

73. *Waldorf-Astoria Segar Company v. Walter J. Salomon*, 109 App. Div. 65, 95 N. Y. Supp. 1053, affirmed on opinion below, 184 N. Y. 584; *Harry Angelo Co. v. Improved Holding Co.*, 137 App. Div. 308, 122 N. Y. Supp. 199; *Bauman & Co. v. Manivet Corp.*, 213 App. Div. 300, 207 N. Y. Supp. 437.

74. *Waldorf-Astoria Segar company v. Walter J. Salomon*, 109 App. Div.

65, 95 N. Y. Supp. 1053, affirmed on opinion below, 184 N. Y. 584.

75. *Michel v. O'Brien*, 6 Misc. 408, 27 N. Y. Supp. 173; *Steward v. Winters*, 4 Sandf. Ch. 587; *Howard v. Ellis*, 6 Super. Ct. (4 Sandf.) 369; *Dodge v. Lambert*, 15 Super. Ct. (2 Bosw.) 570.

76. *Importers' and Traders' Ins. Co. v. Christie*, 28 Super. Ct. (5 Rob.) 169; *Gillilan v. Norton*, 29 Super. Ct. (6 Rob.) 546, 33 How. Pr. 373; *Brandt v. Voorhies*, 177 App. Div. 896, 163 N. Y. Supp. 1110; *Ambler v. Skinner*, 30 Super. Ct. (7 Rob.) 561.

Express covenant required.—"If a landlord wishes to restrict his tenant in the use of the property, he must show an express covenant in the lease preventing the use to which he objects." *Brown v. Broadway & Seventy-*

land so that a sub-tenant will be bound thereby.⁷⁷ It is no defense that the use which the defendants are making in violation of their covenant, is not a public or private nuisance; nor that such prohibited use will not deteriorate the premises in value; nor that the lessees have expended large sums with a view to such prohibited use, which they will lose if not permitted to violate their covenant.⁷⁸

5. Assignment of lease or subletting by tenant.

In a proper case an injunction may be granted to restrain a breach of a covenant contained in a lease forbidding the assignment of the lease or the subletting of a part of the premises without the consent of the owner.⁷⁹ But, if the lease permits the landlord to terminate the lease and re-enter the premises in case of the violation of such a covenant, the remedy in ejectment or by summary proceedings may in some cases be deemed so adequate that injunctive relief will be denied.⁸⁰ Particularly is this true when the undertenant has entered into the premises.⁸¹

6. Damage to freehold by tenant.

If during the continuance of the lease or at its expiration, a tenant commits, or threatens to commit, acts which will cause substantial injury to the freehold, an injunction may

second St. Realty Co., 131 App. Div. 780, 116 N. Y. Supp. 306.

Signs.—A court of equity will enjoin a lessee from violating a restrictive covenant contained in a lease forbidding the lessee to post any signs or notices within fifteen feet of the entrance to other portions of the building retained by the lessor without his consent, any signs to be posted to be of a size, color and style to be determined by the landlord, where it appears that there has been a willful violation of the covenant. *Bartholdi Realty Co. v. Robard Realty Co.*, 156 App. Div. 528, 141 N. Y. Supp. 353.

77. *Importers' and Traders' Ins. Co. v. Christie*, 28 Super. Ct. (5 Rob.) 169; *Gillilan v. Norton*, 29 Super. Ct. (6 Rob.) 546, 33 How. Pr. 373.

78. *Dodge v. Lambert*, 15 Super. Ct.

(2 Bosw.) 570; *Steward v. Winters*, 4 Sandf. Ch. 587.

79. *Proctor Troy P. Co. v. Dugan Store*, 191 App. Div. 685, 181 N. Y. Supp. 786; *Boskowitz v. Cohn*, 197 App. Div. 776, 189 N. Y. Supp. 419; *Barrington Apartment Assn. v. Watson*, 38 Hun 545; *Sloane v. Martin*, 8 St. Rep. 139, 54 Super. Ct. (22 J. & S.) 87. See also, *Fischer v. Ginzburg*, 191 App. Div. 418, 181 N. Y. Supp. 516.

80. *Twenty-fifth St. Realty Co. v. Wachtel*, 193 App. Div. 76, 183 N. Y. Supp. 332; *Gillilan v. Norton*, 29 Super. Ct. (6 Rob.) 546, 33 How. Pr. 373.

81. *Twenty-fifth St. Realty Co. v. Wachtel*, 193 App. Div. 76, 183 N. Y. Supp. 332; *Importers' & Traders' Ins. Co. v. Christie*, 28 Super. Ct. (5 Rob.) 169.

be granted to stay the waste.⁸² Substantial alterations to the buildings may constitute waste, and may be restrained by a court of equity.⁸³ A tenant is guilty of waste if he materially changes the nature and character of the buildings leased, although the value of the property is enhanced by the alteration.⁸⁴ A mandatory injunction may be granted requiring the tenant to restore the premises to their original condition.⁸⁵ In ordinary cases a court of equity interferes only to prevent or stay future waste, not to afford a remedy for past waste.⁹⁰

L. Negotiable instruments.

In a proper case, the transfer of a negotiable instrument may be enjoined, the plaintiff showing the absence of any adequate remedy in an action at law.⁹¹ If the plaintiff alleges the illegality of such an instrument and the facts which would render the instrument available to a holder in due course, equity will assume jurisdiction of the transaction and enjoin the negotiation of the instrument until its legality is determined.⁹² The transfer of a note said to

82. *Freeman v. United States Talc. Co.*, 151 App. Div. 732, 136 N. Y. Supp. 233; *Smith v. Taranto*, 140 N. Y. Supp. 794, affirmed, 158 App. Div. 912, 143 N. Y. Supp. 1144; *Winship v. Pitts*, 3 Paige 259. As to Waste, See Fiero on Particular Actions and Proceedings, vol. 4, page 3541.

Sign on roof.—The use of a roof for advertising purposes is not waste as between landlord and tenant. *Brown v. Broadway & Seventy-second St. Realty Co.*, 131 App. Div. 780, 116 N. Y. Supp. 306.

83. *Winship v. Pitts*, 3 Paige 259.

84. *McDonald v. O'Hara*, 117 Misc. 517, 192 N. Y. Supp. 545.

85. *McDonald v. O'Hara*, 117 Misc. 517, 192 N. Y. Supp. 545. See also, *Chamberlain v. Childs' Unique Dairy Co.*, 54 Misc. 56, 105 N. Y. Supp. 370; *Engle v. Thorn*, 10 N. Y. Super. (3 Duer) 15.

90. *Chamberlain v. Childs' Unique Dairy Co.*, 53 Misc. 371, 104 N. Y. Supp. 912; *Chamberlain v. Childs'*

Unique Dairy Co., 54 Misc. 56, 105 N. Y. Supp. 370; *Watson v. Hunter*, 5 Johns. Ch. 169.

91. *Wickwire v. Warner*, 191 App. Div. 835, 182 N. Y. Supp. 165, affirmed, 233 N. Y. 572; *Joseph Hilton v. Bathold Realty Corp.*, 206 App. Div. 498, 201 N. Y. Supp. 451.

92. *Wickwire v. Warner*, 191 App. Div. 835, 182 N. Y. Supp. 165, affirmed, 233 N. Y. 572; *Joseph Hilton v. Bathold Realty Corp.*, 206 App. Div. 498, 201 N. Y. Supp. 451; *Higgins v. Steinhardter*, 106 Misc. 168, 175 N. Y. Supp. 279; *Weissman v. Naitore*, 125 Misc. 647, 211 N. Y. Supp. 740; *Duanesburgh v. Jenkins*, 46 Barb. 294.

Town bonds.—A town may maintain an action to restrain the negotiation of bonds issued in the name of the town by a person assuming to act as its commissioner, in payment for subscriptions to stock of a railroad company; where the statute under which the bonds purport to be issued declares

be void for usury may be restrained, for, if the instrument is transferred in good faith to a bank, the defense of usury is lost by virtue of section 114 of the Banking Law.⁹³ Relief of this character will not be granted, if it is clear that obligor can, in an action on the obligation, show its invalidity as a defense.⁹⁴ And, in any event, the pre-existing rights of innocent third parties are to be protected.⁹⁵ The injunctive relief in cases of this character is usually granted as an incident to a cancellation of the instrument, and hence this question is further discussed in the Chapter on *Cancellation*.

M. Sales.

Ordinarily, an action at law for damages is an adequate remedy for any breach of a contract of sale, and hence there is no ground for equitable interference.⁹⁶ The circumstances of a particular case may, however, justify injunctive relief.⁹⁷ Thus, if the contract between the manufacturer of certain merchandise and a retail merchant forbids the retailer from selling or exposing for sale similar competing

that "all bonds issued by the commissioners of the several towns shall be binding upon the town," etc., "in the hands of *bona fide* holders and owners," etc., and there is consequently a color of liability against the town. *Duanesburgh v. Jenkins*, 46 Barb. 294.

93. *Weissman v. Naitore*, 125 Misc. 647, 211 N. Y. Supp. 740.

94. *Springfort v. Franklin Sav. Bank*, 75 N. Y. 397; *Galusha v. Flour City Nat. Bank*, 1 Hun 573, 4 T. & C. 68.

95. *Frey v. E. R. Sherbourne Co.*, 193 App. Div. 849, 184 N. Y. Supp. 661.

96. *Ringler v. Mohl*, 115 App. Div. 549, 101 N. Y. Supp. 454; *Pabst Brewing Co. v. Sloane*, 155 App. Div. 580, 140 N. Y. Supp. 858; *Thompson v. Hodskin*, 13 Week. Dig. 367.

97. *Lowenbein v. Fuldmer*, 2 Misc. 176, 21 N. Y. Supp. 615.

Use of stallion.—Where by a written agreement of sale defendant was to have the possession and use of a valuable stallion, in California, during

the seasons of 1919 and 1920, the plaintiff to have him for use in Kentucky during the seasons of 1921 and 1922 and "thereafter on new arrangements mutually satisfactory," the defendant has no legal right to insist upon any condition for the return of the horse to plaintiff except to ship him to plaintiff's stock farm in Kentucky, the season of 1921 now opening. Where defendant flatly refuses to abide by the agreement unless plaintiff enters into a new agreement which is unsatisfactory to him, the plaintiff will be granted a mandatory injunction requiring the defendant to ship the horse in accordance with their agreement, and enjoining other disposition of him. Upon giving a bond a receiver of the stallion will be appointed with power to take appropriate steps, in California or elsewhere, and to invoke the aid of any court to gain possession of the horse, and ship him to plaintiff's stock farm, to which place he should have been sent in August or September, 1920. *Madden*

products of other manufacturers, a violation of this negative covenant may be enjoined.⁹⁸ So, too, where a manufacturer has agreed to use his factory solely for the manufacture of a certain product for another, if it is impossible to estimate the damages which may accrue from a violation of the agreement, the manufacturer may be enjoined from manufacturing such product for third parties.⁹⁹ Likewise, an agreement by a manufacturer to give preference to orders from a certain consumer may, in case there is no adequate remedy at law, be enforced by restraining the manufacturer from selling its products to others until it has fulfilled the preferential obligation.¹ An agreement by the manufacturer of a certain machine, upon the sale of all the machines in stock of that class, that he will make no more, is enforceable by injunction.²

N. Advertising contracts.

In a proper case, equity may grant relief to restrain the violation of a contract for advertising.³ Thus, a contract for the display in a theatre of an advertising curtain, after the preparation of the curtain and a part performance of the contract, may, if the proprietor of the theatre refuses to

v. Rosseter, 114 Misc. 416, 187 N. Y. Supp. 462, affirmed, 196 App. Div. 891, 187 N. Y. Supp. 943.

98. *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60; *Butterick Pub. Co. v. Frederick Loeser Co.*, 232 N. Y. 86.

Saloon leases.—Some years ago when the corner saloon was owned by a brewery, it was frequent practice, on a lease of the saloon, to require the tenant to purchase his beer from the brewery only. A negative covenant of this character was enforced by injunction. *Pabst Brewing Co. v. Sloane*, 155 App. Div. 580, 140 N. Y. Supp. 858. If, however, the tenant was financially responsible, the brewery might be confined to an action for damages. *Ringler v. Mohl*, 115 App. Div. 549, 101 N. Y. Supp. 454.

99. *Lowenbein v. Fuldmer*, 2 Misc. 176, 21 N. Y. Supp. 615; *Banker &*

Campbell Co. v. Stimson, 40 St. Rep. 740, 16 N. Y. Supp. 60.

1. *Ebsary Fireproofing & Gypsum Co. v. Empire Gypsum Co.* 110 Misc. 272, 181 N. Y. Supp. 270.

2. *Excelsior Quilting Co. v. Creter*, 36 Misc. 698, 74 N. Y. Supp. 361.

3. **Sale of advertising rights**—Where such contract for the sale of advertising rights required the purchaser to open an office, to furnish as many pages of advertising as he could secure, and to pay expenses incurred by him under the contract, which was in fact made in settlement of an existing controversy between the parties, the agreement is mutual, not unilateral; and where the contract has been carried out by both parties for several years, the court in its equitable powers can restrain the publisher from doing acts which destroy the rights secured to the purchaser. *Gardi-*

permit the display, be enforced by injunction.⁴ Or, if a contract for advertising in a magazine contains a stipulation against the publication of advertisements of certain competing merchandise, an injunction may issue to restrain the competitor's advertisements.⁵ A publisher cannot be compelled to print advertisements which contain untrue or misleading statements.⁶

O. Conditions in grant or contract.

When a party has an ultimate right to do an act, but only upon some condition precedent, the compliance with which condition is within the power of the party, an injunction may be granted restraining the performance of the act until compliance with the condition.⁷ In the absence of any remedy at law, a court of equity may enjoin the violation of a condition on which a grant was predicated. Thus, if a conveyance of a right of way to a railroad requires the company to provide a crossing, it may be restrained from proceeding with the construction of the road until the crossing is made or the rights of the landowner are otherwise protected.⁸ One who contributes to a fund for an educational institution on condition that it be permanently located at a specified place, may prevent an unauthorized removal of the institution to another location.⁹ But, if a grant provides for the termination of an estate on breach of a condition subsequent, a court of equity will not compel the fulfillment of the condition but will leave the grantor to the remedy given by the grant.¹¹ An injunction will not be granted to restrain town officials from working a highway which has been granted to the town on certain conditions and restrictions, which are claimed to have rendered the deed void.¹²

ner v. The Roycrofters, 134 App. Div. 45, 118 N. Y. Supp. 703, affirmed, 197 N. Y. 511.

4. Beer v. Canary, 2 App. Div. 518, 74 St. Rep. 452, 38 N. Y. Supp. 23.

5. Goddard v. American Queen, 44 App. Div. 454, 61 N. Y. Supp. 133.

6. Amalgamated F. F., Inc. v. Rochester Times-Union, Inc., 128 Misc. 673, 219 N. Y. Supp. 705.

7. Erie Railroad Co. v. City of Buffalo, 180 N. Y. 192.

8. Wheeler v. Rochester & Syracuse R. Co., 12 Barb. 227.

9. Hascall v. Madison Univ., 3 Barb. 174.

11. Erwin v. Hurd, 13 Abb. N. C. 91.

12. Hughes v. Bingham, 135 N. Y. 347.

P. Municipal contracts.

Where a valid contract is made by a municipal corporation or a board thereof, either by way of an ordinance or a resolution, it cannot be rescinded or altered without the consent of the other contracting party.¹³ If a violation by the municipality leaves the other contracting party without an adequate remedy at law, a proper case for injunctive relief may be presented.¹⁴ It may be restrained from interfering with the performance by a contractor of an agreement for the unloading of garbage scows, the number of the scows being so uncertain that damages can not be satisfactorily estimated.¹⁵ On the other hand, if there is an adequate remedy at law for damages sustained by a contractor, equity will afford no relief.¹⁶

ARTICLE III.**PROTECTION OF PROPERTY RIGHTS.****A. Trespass.****1. In general.**

Equity will not ordinarily interfere to enjoin an apprehended trespass upon lands.¹⁷ The remedy at law for money

13. *Beach Land Corp. v. City of New York*, 108 Misc. 70, 177 N. Y. Supp. 439, affirmed, 192 App. Div. 884, 181 N. Y. Supp. 773.

Ante-election promises.—A contract may not be predicated upon ante-election promises made to voters generally during a political campaign by a candidate for public office entitling a voter to restrain the promisor from violating the same. *O'Reilly v. Mitchell*, 85 Misc. 176, 148 N. Y. Supp. 88.

14. *Beach Land Corp. v. City of New York*, 108 Misc. 70, 177 N. Y. Supp. 439, affirmed, 192 App. Div. 884, 181 N. Y. Supp. 773; *Fradus Contracting Co. v. Taylor*, 201 App. Div. 298, 194 N. Y. Supp. 286.

15. *Daily v. New York*, 170 App. Div. 267, 156 N. Y. Supp. 124, affirmed without opinion, 218 N. Y. 665; *Fradus*

Contracting Co. v. Taylor, 201 App. Div. 298, 194 N. Y. Supp. 286.

16. Coal for public buildings.—When a person claims that he is legally entitled to a contract to supply coal for the use of the public schools, which contract the board of education has illegally awarded to another, his remedy is by an action for damages and an injunction will not be granted to prevent the board from procuring such coal from other sources. *French v. Board of Education*, 18 Week. Dig. 149.

17. *Troy, etc., R. Co. v. Boston, etc., R. Co.*, 86 N. Y. 107; *Western Union Tel. Co. v. Syracuse Electric Light, etc., Co.*, 178 N. Y. 325; *Country Club Land Assn. v. Lohbauer*, 56 App. Div. 306, 67 N. Y. Supp. 909; *Powlowski v. Mohawk Golf Club*, 204 App. Div. 200, 198 N. Y. Supp. 30; *Griffin v.*

damages is usually adequate for an act of simple trespass.¹⁸ Or, if the trespass amounts to an actual ouster, it is remediable in an action of ejectment.¹⁹

If, however, irreparable damage may and probably will result from the threatened wrong, equity will take cognizance of the controversy.²⁰ Thus, an injunction may be granted where the anticipated damages are of such a nature that they cannot be estimated with sufficient precision to protect

Winne, 10 Hun 571, affirmed on opinion below, 79 N. Y. 637; *Donovan v. Kissena Park Corp.*, 181 App. Div. 737, 168 N. Y. Supp. 1035; *Mayor of New York v. Conover*, 5 Abb. Pr. 171; *New York v. Conover*, 5 Abb. Pr. 252; *Akrill v. Selden*, 1 Barb. 316; *Gentil v. Arnand*, 38 How. Pr. 94; *Ketchum v. Depew*, 81 Hun 278, 62 St. Rep. 757, 30 N. Y. Supp. 794; *Stevens v. Beekman*, 1 Johns. Ch. 318; *Livingston v. Livingston*, 6 Johns. Ch. 497; *Jerome v. Ross*, 7 Johns. Ch. 315; *Mapes v. Charles*, 5 Silv. Sup. 516, 8 N. Y. Supp. 665, 30 St. Rep. 373; *Thompson v. Hodskin*, 13 Week. Dig. 367; *Carter v. N. Y. West Shore, etc., R. Co.*, 17 Week. Dig. 249; *Bloomington v. Sherman*, 19 Week. Dig. 30.

18. *Country Club Land Assoc. v. Lohbauer*, 56 App. Div. 306, 67 N. Y. Supp. 909; *Marshall v. Peters*, 12 How. Pr. 218; *Gentil v. Arnand*, 38 How. Pr. 94; *National Gas Light Co. v. O'Brien*, 38 How. Pr. 271; *Rider v. N. Y. West Shore, etc., Ry Co.*, 65 How. Pr. 419; *Ketchum v. Depew*, 81 Hun 278, 62 St. Rep. 757, 30 N. Y. Supp. 794; *Mapes v. Charles*, 5 Silv. Sup. 516; 8 N. Y. Supp. 665, 30 St. Rep. 373; *Gentil v. Arnand*, 31 Super. Ct. (1 Sweeny) 641, affirmed, 38 How. Pr. 94; *Thompson v. Hodskin*, 13 Week. Dig. 367.

19. *Gentil v. Arnand*, 38 How. Pr. 94.

20. *Wheelock v. Noonan*, 108 N. Y. 179; *Donovan v. Kissena Park Corp.*, 181 App. Div. 737, 168 N. Y. Supp. 1035; *Genesee Valley, etc., R. Co. v.*

Retsof Min. Co., 15 Misc. 187, 36 N. Y. Supp. 896; *Spear v. Cutter*, 2 Code. Rep. 100, 4 How. Pr. 175; *Rogers v. Hanfield*, 14 Daly 339, 12 N. Y. Supp. 671; *Tribune Association v. Sun Printing, etc., Association*, 7 Hun 175; *Mulry v. Norton*, 29 Hun 660, affirmed, 100 N. Y. 424; *Varick v. Mayor, etc., of N. Y.*, 4 Johns. Ch. 53; *Livingston v. Livingston*, 6 Johns. Ch. 497; *New York Printing, etc., Est. v. Fitch*, 1 Paige 97. "Courts of equity in this state have not general jurisdiction to restrain by injunction all sorts of trespasses threatened to be committed to or upon real property; but to this proposition there are exceptions which have long existed where the circumstances of the case are peculiar and such that it could be clearly seen if the injury threatened is suffered to be done, it will cause irreparable mischief to the owner of the estate, or lead to a multiplicity of suits, or the value of the inheritance be put in jeopardy by a continuance of the trespass. If the suitor is able to present a case falling within any of the exceptional instances, relief is granted without the slightest hesitation, to prevent a failure of justice. The difficulty which arises when a resort is made to a court of equity for relief is for the court to determine whether the facts presented are of such nature as to bring the same within either of the classes over which jurisdiction is conferred." *Fox v. Fitzsimmons*, 29 Hun 574, affirmed without opinion, 100 N. Y. 618.

a party.²¹ The insolvency of the defendant may influence the court to assume jurisdiction of the action.²² A permanent injury to the freehold may be enjoined.²³

If the trespass is of a continuous or constantly recurring nature, a proper case for the granting of an injunction is shown.²⁴ The injunctive remedy is then justified upon the ground that the remedy at law is inadequate, and also upon

21. *Poughkeepsie Gas Co. v. Citizens' Gas Co.*, 89 N. Y. 493; *Wheelock v. Noonan*, 108 N. Y. 179; *Baron v. Korn*, 127 N. Y. 224; *Genesee Valley, etc., R. Co. v. Retsof Min. Co.*, 15 Misc. 187, 36 N. Y. Supp. 896; *Christie v. Shankey*, 12 St. Rep. 657.

22. *Mulry v. Norton*, 100 N. Y. 424; *Spear v. Cutter*, 2 Code Rep. 100, 4 How. Pr. 175, 5 Barb. 486.

23. *Clark v. Mayor, etc., of Syracuse*, 13 Barb. 32.

24. *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; *Poughkeepsie Gas Co. v. Citizens' Gas Co.*, 89 N. Y. 493; *Meyer v. Phillips*, 97 N. Y. 485; *Wheelock v. Noonan*, 108 N. Y. 179; *Coathworth v. Lehigh Valley R. Co.*, 156 N. Y. 451; *Sadlier v. New York*, 185 N. Y. 408; *McCann v. Chasm Power Co.*, 211 N. Y. 301; *Heyman v. Biggs*, 223 N. Y. 118; *New York Dock Co. v. Flinn-O'Rourke Co., Inc.*, 234 N. Y. 127; *Valentine v. Schreiber*, 3 App. Div. 235, 73 St. Rep. 838, 38 N. Y. Supp. 417; *Hinckel v. Stevens*, 17 App. Div. 279, 45 N. Y. Supp. 678; *Hale v. Burns*, 101 App. Div. 101, 91 N. Y. Supp. 929; *Urbano v. Hallenbeck*, 163 App. Div. 844, 147 N. Y. Supp. 244; *Laroy v. Andstein Bldg. Corp.*, 209 App. Div. 895, 205 N. Y. Supp. 400; *Olivella v. N. Y. & Harlem R. Co.*, 31 Misc. 203, 64 N. Y. Supp. 1086, affirmed, 51 App. Div. 612, 64 N. Y. Supp. 1145; *Brooklyn Trust Co. v. City of New York*, 109 Misc. 593, 179 N. Y. Supp. 441, affirmed, 190 N. Y. Supp. 235; *Silver Beach Realty Corp. v. Geelan*, 122 Misc. 644, 204 N. Y. Supp. 701, affirmed, 210 App. Div. 851, 206 N. Y. Supp. 960; *Bernheimer*

v. Manhattan Ry Co., 26 Abb. N. C. 88, 13 N. Y. Supp. 913; *Johnson v. City of Rochester*, 13 Hun 285; *Wright v. Syracuse, etc., R. Co.*, 49 Hun 445, 23 St. Rep. 78, 3 N. Y. Supp. 480, affirmed without opinion, 124 N. Y. 668; *Thomas v. Grand View Beach R. Co.*, 76 Hun 601, 58 St. Rep. 256, 28 N. Y. Supp. 201; *Ketchum v. Depew*, 81 Hun 278, 62 St. Rep. 757, 30 N. Y. Supp. 794; *Barnes v. Hager*, 148 N. Y. Supp. 395, affirmed, 166 App. Div. 952, 151 N. Y. Supp. 1103; *Alfred Peats Co. v. Bradley*, 149 N. Y. Supp. 613, reversed on other grounds, 166 App. Div. 267, 151 N. Y. Supp. 602; *Mohawk & Hudson R. Co. v. Artcher*, 6 Paige 83. "Although the general rule is that an injunction will not be granted to restrain a mere trespass, without special equitable features in the case, it is well settled that such equitable features exist when there is vexation from repeated or continued trespass in the nature of a nuisance, or when the wrongful acts, continued or threatened to be continued, might become the foundation of adverse rights, and would occasion a multiplicity of suits to recover damages." *Johnson v. City of Rochester*, 13 Hun 285. While it may be stated, as a general proposition, that a simple trespass upon the lands of another furnishes no ground for interference by a court of equity to restrain its commission, this rule does not apply where the injury is such that it is not susceptible of adequate pecuniary compensation in damages, or where it is one, the continuance of which would cause a continually recurring grievance. *Wright*

the ground that a multiplicity of actions at law is to be avoided.²⁵ In an action at law damages can be recovered only to the time of the commencement of the action, and hence new actions would be commenced from time to time to recover the damages sustained by the continuous trespass.²⁶ The fact that the property is of but little value, and the damages are therefore small, does not require the owner to seek a court of law for relief against a continuous trespass.²⁷

There has been a growing tendency of the court to extend the remedy of injunction in cases of trespass. When the right is clear, an injunction will now be granted in cases where formerly it was denied.²⁸

2. Mines; quarries; sand banks.

The removal of minerals from real estate is an irreparable damage to the freehold, and may be a continuous trespass.²⁹ The prevention of such an injury is, therefore, within the jurisdiction of courts of equity. The removal of stone from a quarry likewise invokes the equitable powers of the court.³⁰ A sand bank may similarly be protected against invasion.³¹

v. Syracuse, etc., R. Co., 49 Hun 445, 3 N. Y. Supp. 490, 23 St. Rep. 78, affirmed without opinion, 124 N. Y. 668.

25. Meyer v. Phillips, 97 N. Y. 485; Garvey v. Long Island R. Co., 159 N. Y. 323, affirming, 9 App. Div. 254; McCann v. Chasm Power Co., 211 N. Y. 301; Hinckel v. Stevens, 17 App. Div. 279, 45 N. Y. Supp. 678; Hahl v. Sugo, 46 App. Div. 632, 61 N. Y. Supp. 77, reversed on other grounds, 169 N. Y. 109; Donovan v. Kissena Park Corp., 111 App. Div. 737, 168 N. Y. Supp. 1035; Barnes v. Hager, 148 N. Y. Supp. 395, affirmed, 166 App. Div. 952, 151 N. Y. Supp. 1103.

Interest of public in multiplicity of actions.—“Where an injunction is sought to prevent repeated trespasses, the relief is allowed as much upon the ground of public policy as upon any other. The public as well as the plaintiff is interested in preventing a

multiplicity of suits.” White v. Miller, 78 Misc. 428, 139 N. Y. Supp. 660.

26. McCann v. Chasm Power Co., 211 N. Y. 301; Hahl v. Sugo, 46 App. Div. 632, 61 N. Y. Supp. 77, reversed on other grounds, 169 N. Y. 109; Mitchell v. White Plains, 91 Hun 189, 36 N. Y. Supp. 935.

27. Laroy v. Andstein Bldg. Corp., 209 App. Div. 895, 205 N. Y. Supp. 400.

28. See Green Island Ice Co. v. Norton, 42 Misc. 238, 86 N. Y. Supp. 613, affirmed, 105 App. Div. 331, 94 N. Y. Supp. 1147, affirmed, 189 N. Y. 529.

29. West Point Iron Co. v. Reymert, 45 N. Y. 703. See also, Howe v. Rochester Iron Mfg. Co., 66 Barb. 592.

30. West Point Iron Co. v. Reymert, 45 N. Y. 703; White v. Miller, 78 Misc. 428, 129 N. Y. Supp. 660; Norton v. Snyder, 2 Hun 82, 4 T. & C. 330.

31. Donovan v. Kissena Park Corp., 181 App. Div. 737, 168 N. Y. Supp. 1035.

But it is seldom, if ever, that the court will grant a mandatory injunction to compel the defendant to return the material taken from the premises.³²

3. Timber.

A wrongful entry on a timber lot and the cutting of timber therefrom, may constitute a continuous trespass justifying an injunction.³³ The plaintiff in the same action may be allowed damages for past injuries, together with an injunction for future protection.³⁴ The remedy at law for damages may be sufficient redress for the acts of the defendant in removing timber or wood which had been cut by the plaintiff before the commencement of the action.³⁵

4. Encroachment.

An injunction may be granted to restrain an adjoining owner from erecting a building or other structure which

32. *Donovan v. Kissena Park Corp.*, 181 App. Div. 737, 168 N. Y. Supp. 1035.

33. *Litchfield v. Bond*, 186 N. Y. 66; *Duclos v. Kelly*, 122 App. Div. 329, 106 N. Y. Supp. 1058, reversed on other grounds, 197 N. Y. 76; *Spear v. Cutter*, 2 Code Rep. 100, 4 How. Pr. 175, 5 Barb. 486. See also, *Stevens v. Beekman*, 1 Johns. Ch. 318.

Indian lands.—The right of the Seneca nation of Indians, to the use and possession of the Cattaraugus reservation, is in all the individuals composing the nation, residing on such reservation, in their collective capacity; and they having no corporate name, no provision is made by law for bringing an ejectment suit to recover the possession of such lands for their benefit. Nor can such Indians sustain an action at law, in the name of their tribe, to recover the damages sustained by them, by reason of trespasses committed upon their reservations, or to recover a compensation for the use of their lands which have been intruded upon by others without authority. But a bill may be filed by

one or more of them, in behalf of themselves and the other Indians interested to protect their rights and to obtain compensation for the damages sustained by the numerous persons composing the nation. Where an individual, not belonging to the Seneca nation of Indians, had intruded himself into the possession of lands belonging to the Cattaraugus reservation, without the consent of the nation or of its chiefs, and was in the habit of cutting wood and timber thereon, the court of chancery, upon a bill filed by two of the chiefs, in behalf of themselves and others, granted an injunction restraining the defendant from committing waste or trespass on such lands, and from interfering with the possession of the Indians residing on the reservation. *Strong v. Waterman*, 11 Paige 607.

34. *Duclos v. Kelly*, 122 App. Div. 329, 106 N. Y. Supp. 1058, reversed on other grounds, 197 N. Y. 76.

35. *Spear v. Cutter*, 2 Code Rep. 100, 4 How. Pr. 175, 5 Barb. 486; *Griffin v. Winne*, 10 Hun 571, affirmed on opinion below, 79 N. Y. 637.

will encroach upon the plaintiff's premises.³⁶ It is the duty of the owner of a building to restrain by snow guards or otherwise the snow and ice which accumulate upon the roof of his building and not allow the same to pass off to the damage of his neighbor.³⁷ An owner of land who raises the grade thereof is bound to keep all earth and materials used in raising the grade off from the adjoining property. If he permits such materials to extend on the adjoining premises, an injunction may be granted.³⁸

A mandatory injunction may be granted in some cases requiring the removal of an encroachment.³⁹ Drastic relief of this character, however, will not be granted if it appears that the plaintiff suffered the encroachment to be made without objection.⁴⁰ Nor will mandatory relief be granted where the structure was erected in accordance with a practical location of the boundary.⁴¹ And, if the encroachment is very slight, and its removal would cause great damage to the defendant, with little corresponding benefit to the plaintiff, the court will not direct the removal of the encroachment.⁴² If the encroachment was not intentional or wilful, the court may deny equitable relief, on condition that the defendant pay to the plaintiff the value of the land occupied, the plaintiff to convey the strip or an easement therein to the defendant on receipt of such payment.⁴³ But, if the

36. *Baron v. Korn*, 127 N. Y. 224; *Lyle v. Little*, 28 App. Div. 181, 50 N. Y. Supp. 947; *Wistergren v. Everett*, 218 App. Div. 172, 218 N. Y. Supp. 68; *Fox v. Fitzsimmons*, 29 Hun 574, affirmed without opinion, 100 N. Y. 618.

37. *Hollenbeck v. St. Mark's Lutheran Church*, 154 App. Div. 328, 138 N. Y. Supp. 1063.

38. *Berry v. Fleming*, 87 App. Div. 53, 83 N. Y. Supp. 1066.

39. *Baron v. Korn*, 127 N. Y. 224; *Lyle v. Little*, 28 App. Div. 181, 50 N. Y. Supp. 947; *Hahl v. Sugo*, 46 App. Div. 632, 61 N. Y. Supp. 77, reversed on other grounds, 169 N. Y. 109; *Crocker v. Manhattan L. Ins. Co.*, 61 App. Div. 226, 70 N. Y. Supp. 492; *Goldbacher v. Eggers*, 38 Misc. 36, 76 N. Y. Supp. 881, affirmed, 82 App. Div.

637, 84 N. Y. Supp. 1127, affirmed without opinion, 179 N. Y. 551; *Knickerbocker Ice Co. v. Forty-second St., etc., R. Co.*, 48 Super. Ct. (16 J. & S.) 489, 65 How. Pr. 210.

40. *Jacobus v. Willis*, 74 Misc. 591, 134 N. Y. Supp. 455; *McSorley v. Gomprecht*, 26 N. Y. Supp. 917, 30 Abb. N. Cas. 412.

41. *Blumenaaurer v. O'Conner*, 32 Misc. 17, 66 N. Y. Supp. 137, affirmed on opinion below, 62 App. Div. 618, 71 N. Y. Supp. 1133.

42. *Goldbacher v. Eggers*, 38 Misc. 36, 76 N. Y. Supp. 881, affirmed, 82 App. Div. 637, 84 N. Y. Supp. 1127, affirmed without opinion, 179 N. Y. 551; *McSorley v. Gomprecht*, 30 Abb. N. C. 412, 26 N. Y. Supp. 917.

43. *Crocker v. Manhattan L. Ins. Co.*, 61 App. Div. 226, 70 N. Y. Supp.

defendant was a wilful trespasser, a court of equity will not hesitate to compel him to undo the wrong.⁴⁴

5. Deposit of materials on private premises.

It is clearly within the power of a court of equity to restrain one from dumping stones or refuse on the property of another, where such acts constitute an irreparable injury to the owner of the freehold.⁴⁵ Moreover, in a proper case, a mandatory injunction may compel the defendant to restore the premises to the same condition as before the trespass.⁴⁶ Mandatory relief, however, is a drastic remedy in such a case, and may be withheld, if the benefits to be derived by the plaintiff are not sufficient to warrant the burden to be placed on the defendant.⁴⁷

6. Dumping of sewerage.

Equity may enjoin the deposit of sewerage on private lands.⁴⁸ Equitable relief is proper in such a case on the ground of the irreparable injury to the premises and the continuous trespass thus created. The wrong may also constitute a nuisance for which equity will provide a remedy. When a municipal corporation discharges or threatens to discharge sewage from the outlet of a permanent sewer directly upon private lands without having acquired the right so to do, the owner is entitled to judgment of a court of equity restraining the injury committed or threatened;

492; *Goldbacher v. Eggers*, 38 Misc. 36, 76 N. Y. Supp. 881, affirmed, 82 App. Div. 637, 84 N. Y. Supp. 1127, affirmed without opinion, 179 N. Y. 551.

44. *Goldbacher v. Eggers*, 38 Misc. 36, 76 N. Y. Supp. 881, affirmed, 82 App. Div. 637, 84 N. Y. Supp. 1127, affirmed without opinion, 179 N. Y. 551.

45. *White v. Lansing*, 119 App. Div. 584, 103 N. Y. Supp. 1040.

Necessity of dumping.—Although it is a question as to whether one landowner is entitled to deposit refuse on the lands of another owner by virtue of provisions in a deed, equity will restrain such deposit when the act is not necessary but is a mere matter of

convenience. *White v. Lansing*, 119 App. Div. 584, 103 N. Y. Supp. 1040.

46. *Wheelock v. Noonan*, 108 N. Y. 179; *White v. Lansing*, 119 App. Div. 584, 103 N. Y. Supp. 1040; *Eno v. Christ*, 25 Misc. 24, 54 N. Y. Supp. 400; *Summerville Fruit Farms v. Petrassi Co.*, 124 Misc. 826, 209 N. Y. Supp. 367, affirmed, 217 App. Div. 722, 216 N. Y. Supp. 924.

47. *Donovan v. Kissena Park Corp.*, 181 App. Div. 737, 168 N. Y. Supp. 1035.

48. N. Y. Cent., etc., R. Co., v. City of Rochester, 127 N. Y. 591; *Sammons v. City of Gloversville*, 34 Misc. 459, 70 N. Y. Supp. 284, affirmed without opinion, 67 App. Div. 628, 74 N. Y. Supp. 1145, affirmed, 175 N. Y. 346;

he is not confined to a recovery of his damages in actions of trespass.⁴⁹ A remedy commensurate with the wrong will be furnished, although the sewer is constructed under legislative authority.⁵⁰ When, as in the case of a municipality, the rights of the public are affected, the operation of the injunction may be delayed until the city acquires the right of sewerage by eminent domain or establishes a system for sewerage disposal.⁵¹

7. Construction of railroad on private property.

The unauthorized construction and maintenance of a railroad on private premises is a continuous trespass, and equity will readily assume jurisdiction of the wrong.⁵² Even when the railroad is within the bounds of a street or highway, equity has jurisdiction of a suit by an abutting owner.⁵³ But the interests of the public demand that the railroad continue its operations, and hence the relief is molded so as to permit the railroad to institute condemnation proceedings. If condemnation proceedings have already been commenced, injunctive relief will not be granted, and the plaintiff will be remitted to the condemnation proceedings for his money relief.⁵⁴

8. Beach.

The threatened invasion of a part of a beach of which the plaintiff has the exclusive use may present a case for equitable relief.⁵⁵ The occupation of a part of beach with the intention of building a boathouse thereon, constitutes a con-

Beach v. City of Elmira, 22 Hun 158; *Vick v. City of Rochester*, 46 Hun 607, 13 St. Rep. 31.

49. *N. Y. Cent., etc., R. Co. v. City of Rochester*, 127 N. Y. 591; *Sammons v. City of Gloversville*, 34 Misc. 459, 70 N. Y. Supp. 284, affirmed without opinion, 67 App. Div. 628, 74 N. Y. Supp. 1145, affirmed, 175 N. Y. 346.

50. *Sammons v. City of Gloversville*, 34 Misc. 459, 70 N. Y. Supp. 284, affirmed without opinion, 67 App. Div. 628, 74 N. Y. Supp. 1145, affirmed, 175 N. Y. 346.

51. *Sammons v. City of Gloversville*,

34 Misc. 459, 70 N. Y. Supp. 284, affirmed without opinion, 67 App. Div. 628, 74 N. Y. Supp. 1145, affirmed, 175 N. Y. 346; *Vick v. City of Rochester*, 46 Hun 607, 13 St. Rep. 31.

52. *Thomas v. Grand View Beach R. Co.*, 76 Hun 601, 58 St. Rep. 256, 28 N. Y. Supp. 201.

53. See, *infra*, III-I, Streets and Highways.

54. *Carter v. N. Y. West Shore, etc., R. Co.*, 17 Week. Dig. 249.

55. *Mulry v. Norton*, 29 Hun 660, affirmed, 100 N. Y. 424.

tinuous trespass which may be restrained at the suit of the true owner.⁵⁶

9. Roof.

The maintenance of an advertising sign on the roof of a building may be a continuous trespass, for which injunction is an appropriate remedy.⁵⁷ But it has been held that the tenant of the second floor of a building having the privilege to use a roof in the rear, cannot secure an injunction to restrain the tenant of the first floor from placing a skylight in such roof.⁵⁸

10. Trespass by animals.

If the owner of cattle permits them to run at large so that they repeatedly break in and wander over the premises of another and cause damage thereto, an injunction may be granted.⁵⁹

11. Damage to personal property.

As a general rule an anticipated damage to or conversion of personal property will not be restrained by injunction.⁶⁰ Such relief as a court of equity can grant by way of damages or in an action of replevin is generally thought adequate.⁶¹ There is, however, no arbitrary rule forbidding equitable relief, should it appear that no other remedy was adequate in a particular case.

56. *Silver Beach Realty Corp. v. Geelan*, 122 Misc. 644, 204 N. Y. Supp. 701, affirmed, 210 App. Div. 829, 206 N. Y. Supp. 961.

57. *Alfred Peats Co. v. Bradley*, 149 N. Y. Supp. 613, reversed on other grounds, 166 App. Div. 267, 151 N. Y. Supp. 602.

58. *Gentil v. Arnand*, 31 Super. Ct. (1 Sweeney) 641, affirmed, 38 How. Pr. 94.

59. *Barnes v. Hager*, 148 N. Y. Supp. 395, affirmed, 166 App. Div. 952, 151 N. Y. Supp. 1103. The court in this case said: "It seems, then, that acts of trespass long continued may become a nuisance which equity will enjoin. Even if they do not, nevertheless, the action here may be main-

tained on the theory of a continuous or constantly recurring trespass, since that is the foundation of the alleged nuisance set forth in the complaint, and since the evidence is sufficient to sustain a finding to that effect. Where acts of trespass are continuous or constantly recurring, whereby, if permitted to continue, irreparable injury may result, an injunction will lie to restrain same, both on the ground that the remedy at law is inadequate, and to prevent a repetition or multiplicity of such suits."

60. *Gentil v. Arnand*, 38 How. Pr. 94; *National Gas Light Co. v. O'Brien*, 38 How. Pr. 271.

61. *Gentil v. Arnand*, 38 How. Pr. 94.

12. Title of plaintiff.

When the title to the premises on which the trespass is claimed to have been made is a disputed issue in the case, the burden is upon the plaintiff of establishing his right.⁶² The plaintiff must succeed on the strength of his own title, not on the weakness of his adversary's title.⁶³ A trespasser upon real estate may not invoke the aid of a court of equity to preserve to him the fruits of his wrong, by restraining the party who was in possession from resuming his lawful occupation which was taken from him by the trespass.⁶⁴

13. Necessity of establishing title at law.

In some of the earlier decisions, it was held that, if the plaintiff's right was doubtful, an injunction would not be granted to restrain interference with the right until it had been established at law.⁶⁵ But, since the blending of courts of equity and of law, it is held that in an equitable action all questions of the plaintiff's title or right may be determined.⁶⁶ It is no longer necessary that disputed rights be first determined in an action at law. But, if there is also pending a suit at law, a court of equity may in its discretion, refuse to grant relief until the issues in the other action are decided.⁶⁷

B. Waste.

Sections 520-528 of the Real Property Law contain provisions for an action of waste. The action there regulated contemplates a judgment for treble damages; or, if the action is between co-tenants, a partition of the premises.⁶⁸ The statutory remedy is available for an injury which has been accomplished, for a court of equity does not grant relief in such a case.⁶⁹ The equitable powers of the court

62. *Braker v. McMorrow*, 30 Misc. 390, 63 N. Y. Supp. 1016.

63. *Hayden v. Matthews*, 4 App. Div. 338, 74 St. Rep. 589, 38 N. Y. Supp. 905, affirmed, 158 N. Y. 735.

64. *Littlejohn v. Attrill*, 94 N. Y. 619.

65. *Seneca Woolen Mills v. Tillman*, 2 Barb. Ch. 9; *Hart v. Albany*, 3 Paige 213, affirmed, 9 Wend 571.

66. *West Point Iron Co. v. Reymert*,

45 N. Y. 703; *Campbell v. Seaman*, 63 N. Y. 568; *Lacustrine, etc., Co. v. Lake Guano, etc.*, 82 N. Y. 476; *Baron v. Korn*, 127 N. Y. 224; *Westergren v. Everett*, 218 App. Div. 172, 218 N. Y. Supp. 68.

67. *Lacustrine Fertilizer Co. v. Lake Guano, etc., Co.*, 82 N. Y. 476.

68. See *Fiero on Particular Actions and Proceedings*, vol. 4, page 3541.

69. *Van Wyck v. Alliger*, 6 Barb.

are invoked to protect the freehold against a threatened waste,⁷⁰ and in the same action damages for past waste may be allowed.⁷¹ Before a court of equity will act, it must be satisfied that acts of waste will be committed unless it interferes.⁷²

In a proper case, a mortgagee can have equitable relief to prevent waste by the person in possession of the mortgaged premises.⁷³ A judgment creditor having a lien on the prem-

507; *Watson v. Hunter*, 5 Johns. Ch. 169.

The removal of timber which has been unlawfully cut may be enjoined.—*Disbrow v. Westchester Hardwood Co.*, 17 App. Div. 610, 45 N. Y. Supp. 376, reversed on other grounds, 164 N. Y. 415.

70. *Disbrow v. Westchester Hardwood Co.*, 17 App. Div. 610, 45 N. Y. Supp. 376, reversed on other grounds, 164 N. Y. 415; *Van Wyck v. Alliger*, 6 Barb. 507; *Johnson v. White*, 11 Barb. 194; *Rodgers v. Rodgers*, 11 Barb. 595; *Spear v. Cutting*, 2 Code Rep. 100, 4 How. Pr. 175, 5 Barb. 486; *Vandermark v. Schoonmaker*, 9 Hun 16; *Kane v. Vanderburgh*, 1 Johns. Ch. 11; *Watson v. Hunter*, 5 Johns. Ch. 169; *Winship v. Pitts*, 3 Paige 259; *Sarles v. Sarles*, 3 Sandf. Ch. 601; *Herman v. Stewart*, 5 Week. Dig. 408.

A purchaser at a tax sale has, during the period allowed for redemption, no estate in the land and has consequently no constructive possession of the premises and no right to go upon them or to make use of them; before receiving his tax deed he has a lien upon the lands purchased for the payment of the purchase money and interest, but his entry upon the premises would be a trespass upon the possession, active or constructive, of the owner, who might recover against him for any injury committed. That the owner is entitled during such period, to cut and remove timber from the lands and generally to exercise all the

rights incident to ownership; that a tax claimant cannot, therefore, maintain an action to recover the possession of timber cut on the lands before the issuing of the tax deed. *Millard v. Breckwoldt*, 100 App. Div. 44, 90 N. Y. Supp. 890.

A wife who did not join in a deed by which her husband conveyed lands owned by him is not entitled to an injunction restraining the grantee from drilling on the lands for oil and gas on the theory that such acts constitute waste to the injury of her inchoate right of dower, if the land had never been used by her husband to obtain oil and the wells were first opened by his grantee. *Rumsey v. Sullivan*, 166 App. Div. 246, 150 N. Y. Supp. 237.

71. *Kidd v. Dennison*, 6 Barb. 9; *Rodgers v. Rodgers*, 11 Barb. 595; *Weatherby v. Wood*, 29 How. Pr. 404; *Sarles v. Sarles*, 3 Sandf. Ch. 601.

72. *Rodgers v. Rodgers*, 11 Barb. 595.

73. *Mutual Life Ins. Co. v. Bigler*, 79 N. Y. 568; *Cahn v. Hewsey*, 31 Abb. N. C. 387, 8 Misc. 384, 59 St. Rep. 868, 29 N. Y. Supp. 1107; *Robinson v. Presnick*, 3 Edw. Ch. 246; *Herman v. Stewart*, 5 Week. Dig. 408. See also, *Hurst v. Elliott*, 52 Hun 273, 23 St. Rep. 476, 5 N. Y. Supp. 218.

Mortgage not due.—The equitable remedy may be invoked by a mortgagee before the mortgage is due, if his security is prejudiced. *Cahn v. Hewsey*, 31 Abb. N. C. 387, 8 Misc. 384, 59 St. Rep. 868, 29 N. Y. Supp. 1107.

ises may have equitable relief for the protection of his lien.⁷⁴ A tenant for years or for life may be restrained from the commission of waste at the suit of the remainderman.⁷⁵ A person having only an equitable contingent interest in premises may maintain an action for waste.⁷⁶

C. Nuisance.

Courts of law and courts of equity have always had concurrent jurisdiction in matters relating to private nuisances.⁷⁷ There are three remedies available for an injury arising out of a nuisance: (1) An action at law in which money damages only are sought; (2) An action at law under section 529 of the Real Property Law in which the judgment awards damages or directs the removal of the nuisance, or both; (3) An action in equity to restrain a continuing nuisance. A continuing trespass, in some cases, constitutes a private nuisance, so that equitable relief may be had, either on the theory that such relief will be granted to restrain a trespass of that nature, or on the theory that a nuisance exists.⁷⁸ Relief from a nuisance is particularly discussed in Fiero on *Particular Actions and Proceedings*, volume 3, page 2454.

D. Spite fences.

At common law, the owner of property, in the absence of a covenant to the contrary, could erect a fence or wall on his own premises, although it interfered with his neighbor's view. The matter was one of legal right, and intent was unimportant. The Legislature, however in 1922, added section 3 to the Real Property Law, declaring fences of this character over ten feet in height a private nuisance. The statute is constitutional, and an injunction may be granted to restrain the erection of such a fence.⁷⁹

74. *Vandermark v. Schoonmaker*, 9 Hun 16.

75. *Sarles v. Sarles*, 3 Sandf. Ch. 601.

76. *Lee v. Whallon*, 20 Week. Dig. 366.

77. *Miller v. Edison Elec. Illum. Co.*, 78 App. Div. 390, 80 N. Y. Supp. 319; *Olmstead v. Loomis*, 6 Barb. 152, reversed on other grounds, 9 N. Y. 423; *Fisk v. Wilber*, 7 Barb. 395.

78. *Garvey v. Long Island R. Co.*, 159 N. Y. 323; *Friedman v. Columbia Machine Works*, 99 App. Div. 504, 91 N. Y. Supp. 129; *Urbano v. Hallenbeck*, 163 App. Div. 844, 147 N. Y. Supp. 244; *Wright v. Syracuse, etc., R. Co.*, 49 Hun 445, 23 St. Rep. 73, 3 N. Y. Supp. 480, affirmed without opinion, 124 N. Y. 668.

79. *Saperstein v. Berman*, 119 Misc. 205, 195 N. Y. Supp. 1.

E. Blasting.

An owner seeking to improve his premises may use explosives; but in so doing he is bound to exercise care commensurate with the danger to adjoining owners. This requires a very cautious regard for his neighbor's rights, particularly in thickly populated communities.⁸⁰ An injunction will not be granted to restrain blasting done with due care.⁸¹ But, if the blasting is conducted in such a manner as to cause irreparable damage to an adjoining owner, when smaller quantities of explosive or other means would avoid the injury, an injunction may be granted.⁸² If the blasting hurls debris to fall on a neighbor's lands, and the work could be carried on without causing such damage, equitable relief is proper.⁸³ The fact that the work is being done pursuant to the terms of a municipal ordinance, affords no defense.⁸⁴

F. Easements.**1. In general.**

A court of equity will protect a party in the enjoyment of an easement,⁸⁵ if there exists no adequate remedy at law. It is not necessary that the right be established in a court

80. *Booth v. Rome, Watertown, etc., R. Co.*, 140 N. Y. 267. See also, *Brennan v. Schreiner*, 20 N. Y. Supp. 130, 28 Abb. N. Cas. 481.

Independent contractor.—An injunction will not be granted to restrain blasting, where it appears that it was done by an independent contractor who was employed to accomplish a certain result, not in itself wrongful, and the owner reserved to himself no control over the manner in which it should be done. *Hill v. Schneider*, 13 App. Div. 299, 43 N. Y. Supp. 1.

81. *DeCarvajal v. Young Men's Christian Assn.*, 37 Misc. 72, 76 N. Y. Supp. 474.

82. *Hill v. Schneider*, 13 App. Div. 299, 43 N. Y. Supp. 1; *Stevenson v. Pucci*, 32 Misc. 464, 66 N. Y. Supp. 712.

83. *Wilsey v. Callanan*, 49 St. Rep. 530, 21 N. Y. Supp. 165.

84. *Rogers v. Hanfield*, 14 Daly 339, 12 N. Y. Supp. 671.

85. *Newman v. Nellis*, 97 N. Y. 285; *Herman v. Roberts*, 119 N. Y. 37; *Borough Bill Posting Co. v. Levy*, 144 App. Div. 784, 129 N. Y. Supp. 740; *Q. R. S. Co. v. Phillips-Jones Corp.*, 194 App. Div. 170, 185 N. Y. Supp. 127, affirmed, 233 N. Y. 626; *Lambert v. Huber*, 22 Misc. 462, 50 N. Y. Supp. 793; *Brown-Brand Realty Co. v. Saks & Co.*, 126 Misc. 336, 214 N. Y. Supp. 230, affirmed, 218 N. Y. Supp. 706; *Olofson v. Malpede*, 127 Misc. 813, 216 N. Y. Supp. 695; *Birkett Mills v. Fenner*, 142 N. Y. Supp. 1045; *Dexter v. Beard*, 25 St. Rep. 664, 7 N. Y. Supp. 11, 2 Silv. Sup. Ct. 106, affirmed, 130 N. Y. 549.

Usual remedy.—An injunction is the usual remedy invoked by the owner of a legal easement to remove an obstacle to its possession and enjoyment. The

of law before the commencement of an equitable action.⁸⁶ In a proper case a mandatory injunction may be granted to compel the removal of obstructions which interfere with the use of the easement.⁸⁷ But, if the easement is of no substantial benefit to the plaintiff and its enforcement is of substantial detriment to the defendant, the court, in the exercise of its discretion, may deny equitable relief, and remit the plaintiff to his remedy for damages.⁸⁸ An easement is always to be distinguished from a license, as the latter may be revocable.⁸⁹

2. Right of way.

A court of equity may enjoin any interference with the enjoyment of a private right of way.⁹⁰ Unless the usual rights of the parties are expressly restricted by the grant, the owner of the servient tenement may bridge the right of way,⁹¹ but he must leave an adequate space for ingress and egress.⁹² The grant of a right of way includes such rights as are incident or necessary to the use of the right, such as the right to make repairs to the way. The incidental rights are equally within the protection of courts of equity.⁹³

3. Light, air and view.

An easement of light, air and view may be protected by a court of equity.⁹⁴ A right of this character is usually

fact that there is neither privity of estate nor privity of contract between the owner and the aggressor is immaterial." *Saratoga State Waters Corp. v. Pratt*, 227 N. Y. 429.

86. *Lambert v. Huber*, 22 Misc. 462, 50 N. Y. Supp. 793.

87. *Lambert v. Huber*, 22 Misc. 462, 50 N. Y. Supp. 793. See also, *Robinson v. St. John's Guild*, 197 App. Div. 260, 188 N. Y. Supp. 844.

88. *Powlowski v. Mohawk Golf Course*, 119 Misc. 139, 195 N. Y. Supp. 788, modified, 204 App. Div. 200, 198 N. Y. Supp. 30.

89. *D'Aversa v. Guido*, 213 App. Div. 355, 210 N. Y. Supp. 621, affirmed, 244 N. Y. 590; *Rochester Poster Advertising Co., Inc. v. Smithers*, 130 Misc. 676, 224 N. Y. Supp. 676.

90. *Newman v. Nellis*, 97 N. Y. 285;

Herman v. Roberts, 119 N. Y. 37; *Keefe v. Annpaul Realty Co.*, 215 App. Div. 301, 213 N. Y. Supp. 637; *Lambert v. Huber*, 22 Misc. 462, 52 N. Y. Supp. 793; *Olofson v. Malpede*, 127 Misc. 813, 216 N. Y. Supp. 695.

Appurtenances.—A right of way may be conveyed by a deed, "with the appurtenances," although the easement is not specifically mentioned. *Newman v. Nellis*, 97 N. Y. 285.

91. *Andrews v. Cohen*, 221 N. Y. 148.

92. *Keefe v. Annpaul Realty Co.*, 215 App. Div. 301, 213 N. Y. Supp. 637.

93. *Herman v. Roberts*, 119 N. Y. 37.

94. *Simmons v. Crisfield*, 197 N. Y. 365; *Brown-Brand Realty Co. v. Saks & Co.*, 126 Misc. 336, 214 N. Y. Supp. 230, affirmed, 218 N. Y. Supp. 706.

acquired through a covenant which restricts the owner of premises from erecting a structure on a specified part of his land.⁹⁵ If, however, there is no evidence that the defendant's acts have substantially damaged the plaintiff, the court, in its discretion, may deny injunctive relief.⁹⁶

4. Sewerage, pipe lines.

A court of equity may enjoin the owner of the dominant estate, or a third person, from interfering with an easement permitting the maintenance of water pipes, sewer lines, or other similar conduits.⁹⁷ If, however, the plaintiff has but a license, it may be revoked, and equity will not interfere.⁹⁸

5. Bill board.

The right to maintain advertising signs on the premises of another may be an easement in gross; and, if so, it may be protected by a court of equity.⁹⁹ If, however, the agreement is not authenticated as required by section 243 of the Real Property Law, it may be only a license revocable at the will of the owner.¹

6. Party wall.

Equity has jurisdiction to restrain either of the parties to a party wall agreement from interfering with the wall to the prejudice of the other.² If unauthorized alterations in the wall have been made, a mandatory injunction for restoration may be granted.³ Thus, one party may be compelled to close up openings which he has wrongfully made in the wall.⁴ Equity, however, will not lend its aid for the enforce-

95. See, *supra*, II-J, Restrictive covenant as to use of property.

96. *Wormser v. Brown*, 149 N. Y. 163.

97. *Singleton v. McGurk*, 117 Misc. 340, 191 N. Y. Supp. 232.

98. *D'Aversa v. Guido*, 213 App. Div. 355, 210 N. Y. Supp. 621, affirmed, 244 N. Y. 590.

99. *Borough Bill Posting Co. v. Levy*, 144 App. Div. 784, 129 N. Y. Supp. 740; *Rochester Poster Adv. Co., Inc.*

v. Smithers, 224 App. Div. 435, 231 N. Y. Supp. 315.

1. *Rochester Poster Adv. Co., Inc. v. Smithers*, 130 Misc. 676, 224 N. Y. Supp. 676.

2. *Lyle v. Little*, 83 Hun 532, 66 St. Rep. 508, 33 N. Y. Supp. 8.

3. *Herrman v. Hartwood Holding Co.*, 193 App. Div. 115, 183 N. Y. Supp. 402.

4. *Metzger v. 46 West 95th St., Inc.*, 216 App. Div. 289, 214 N. Y. Supp. 664, affirmed, 244 N. Y. 520.

ment of a technical right of no substantial benefit to the plaintiff.⁵

7. Unauthorized use of easement.

An unlawful or excessive use of an easement may be enjoined. Where the nature and extent of the use of the easement is unrestricted the use by the dominant tenement may be enlarged or changed, but the owner of the dominant tenement may not subject the servient tenement to servitude or use in connection with other premises to which the easement is not appurtenant.⁶

8. Illegal attempt to assert easement.

One who enters or threatens to enter the premises of another, asserting an easement therein, may be enjoined from such trespasses.⁷ An action in equity will lie to restrain the maintenance of an easement when such maintenance is continuous and an action at law relating thereto will be inadequate.⁸

G. Licenses.

A mere license to use the premises of another for a particular purpose is, as a general rule, revocable by the owner of the premises. The owner, therefore, cannot be restrained from revoking the permission.⁹ A written license, however, may be construed as an easement, which will be protected by a court of equity. But, if not acknowledged or attested as required by section 243 of the Real Property Law, it will

5. *Mollenhauer v. Wolfe*, 118 Misc. 390, 193 N. Y. Supp. 348, affirmed, 207 App. Div. 869, 201 N. Y. Supp. 926.

6. *McCullough v. Broad Exchange Co.*, 101 App. Div. 566, 92 N. Y. Supp. 533, affirmed, 184 N. Y. 592.

7. *Herman v. Biggs*, 223 N. Y. 118.

Advertising signs.—Where it has been judicially determined that a "sky sign" erected on a building in the city of New York is an unlawful structure, a plaintiff who shows special damage by reason of the maintenance of the sign and also that it will sustain further special damage if the sign con-

tinues to be operated, is entitled to an injunction *pendente lite* restraining the defendant from continuing the nuisance, even though mandamus will lie to compel the removal of the sign by the proper municipal authorities. *Empire Leasing Co. v. Mecca Realty Co.*, 174 App. Div. 433, 161 N. Y. Supp. 240.

8. *Heyman v. Biggs*, 223 N. Y. 113.

9. *D'Aversa v. Guido*, 213 App. Div. 355, 210 N. Y. Supp. 621, affirmed, 244 N. Y. 590. See also, *Sullivan Advertising Co. v. Goldsticker*, 73 Misc. 291, 130 N. Y. Supp. 1021.

be ineffective as against a subsequent purchaser of the premises.¹⁰

A valid agreement between a taxicab company and the owner of a hotel or other resort granting the company the exclusive right to maintain a stand in front of the premises may be enforced by enjoining the owner and a subsequent licensee from interfering with the rights previously granted.¹¹ A different conclusion may be reached when the license is not exclusive.¹²

H. Lateral support.

The right of lateral support will be protected by equity. The court will restrain a landowner from excavating or removing soil from his land adjoining the land of another, if the effect of such excavation and removal will be to cause the land of his neighbor, by reason of the withdrawal of its lateral support, to fall away or subside.¹³ The owner of an island may restrain one from excavating between the shore and thread of the stream, where the effect of the excavation would be to interfere with the lateral support of the land.¹⁴ A municipality may restrain a landowner from digging on his own land adjacent to a highway, if the acts of the abutting owner are such as to imperil the safety of the road.¹⁵ A neighboring abutting owner may also have injunctive relief as against an excavation which interferes with the lateral support of a highway.¹⁶

I. Streets and highways.

1. Obstructions.

Equity has power to enjoin an unlawful obstruction of a public highway.¹⁷ An action for that purpose may be main-

10. Rochester Poster Advertising Co. v. Smithers, 130 Misc. 676, 224 N. Y. Supp. 676.

11. Willis Cab. Co. v. Abbaye, 67 Misc. 568, 124 N. Y. Supp. 756.

12. Lynch v. Murphy Hotel Co., 130 App. Div. 691, 115 N. Y. Supp. 465.

13. Farrant v. Marshall, 21 Barb. 409.

14. Border Island Co. v. Cowles Shipyard Co., 94 Misc. 340.

15. City of Troy v. Murray, 128 Misc. 419, 219 N. Y. Supp. 681.

16. Melburn v. Fowler, 27 Hun 568.

17. DeWitt v. VanSchoyk, 110 N. Y. 7; Town of Hempstead v. Long Island R. Co., 120 Misc. 497, 198 N. Y. Supp. 850; Corning v. Lowerre, 6 Johns. Ch. 439; Richardson, etc., Co. v. Barstow Stove Co., 11 N. Y. Supp. 935, 26 Abb. N. Cas. 150, affirmed, 36 St. Rep. 983, 13 N. Y. Supp. 358; Purroy v. Schuyler, 15 St. Rep. 337.

Lamp-post.—The court will not restrain the erection and continuance of a lamp-post and lamp in front of or

tained either by the public authorities or by a nearby abutting owner who is specially damaged thereby.¹⁸ Equitable jurisdiction may be sustained, not only on the ground of irreparable damage, but on the theory that the obstruction constitutes a nuisance.¹⁹ A threatened obstruction, if there is reasonable ground to believe that the threat will be carried out, may be restrained.²⁰ Or, if the obstruction has been accomplished, a mandatory injunction may compel its removal.

The maintenance of an exhibition on private premises, if it causes the congregating of large crowds in the street may so obstruct traffic as to constitute a nuisance, and hence may be enjoined.²¹

near a dwelling-house, upon the ground that it is a nuisance to the owner or inhabitants, unless the fact that it is so is clearly established by the proofs. Whether such an erection shall be permitted or continued, rests in the discretion of the corporation of the city, and when no special injury is shown, the court has no right to restrain the exercise of this discretion. *Parsons v. Travis*, 8 Super. Ct. (1 Duer) 439.

Soldiers' and Sailors' Monument.—An abutting owner of property on Riverside Drive in the city of New York distant about 200 feet from the proposed site in Riverside Park of a soldiers' and sailors' monument, and who has no contract right to a view from her premises, cannot restrain the city from erecting the monument, as permitted by chapter 522 of the Laws of 1893, upon the ground that its erection will encroach upon her easement of view. *Clark v. City of New York*, 32 Misc. 52, 66 N. Y. Supp. 103, affirmed, 54 App. Div. 631, 66 N. Y. Supp. 1129.

18. *Corning v. Lowerre*, 6 Johns. Ch. 439.

19. *Callanan v. Gilman*, 107 N. Y. 360; *Corning v. Lowerre*, 6 Johns. Ch. 439.

20. *Purroy v. Schuyler*, 15 St. Rep. 337.

21. *Shaw's Jewelry Shop, Inc. v. New York Herald Co.*, 170 App. Div. 504, 156 N. Y. Supp. 651, affirmed, 224 N. Y. 731.

Employment agency.—The proprietor of a hair dressing and manicuring parlor, occupying rooms leased on the first floor of a building, is not entitled to injunctive relief, restraining another lessee, operating an employment agency on the upper floor, access to which is had through a hall separated from the first establishment by a wall, from maintaining on one side of the hallway at or near the entrance, with the consent of the landlord, a bulletin board of positions to be filled and wages to be paid upon the ground that such board at times attracts a large number of people which interfere with free access to and from her premises, where it does not appear that crowds gathered so as to create a public nuisance or so as to interfere with customers desiring to enter or leave her place of business. Before a party can be enjoined from using his own property for a legitimate business, the proof must clearly establish that the use is calculated to and does, in fact, deprive another of the use of his property to his damage. *Obradowitz v. Odell*, 171 App. Div. 250, 157 N. Y. Supp. 172.

Temporary partial obstructions of the highway for building operations and for the convenience of abutting owners, if not unreasonable, may be permitted.²² The obstruction of the sidewalk from the loading and unloading of goods to and from the store of an abutting owner may, if unreasonably continued, be restrained.²³

The issue as to the right of one to remove forcibly an obstruction in a street or highway, is one which can be determined in an equitable action of injunction.²⁴ If the obstruction was unauthorized, the municipal authorities will not be restrained from removing it.²⁵ But, if the public authorities are wrong in their claim that a structure obstructs the highway and threaten to remove it by force, an injunction may properly be granted.²⁶

2. Encroachments.

An encroachment on a highway may constitute a nuisance, which may be enjoined at the suit of the public authorities, or in an action by a nearby abutting owner who is specially damaged thereby.²⁷ The municipality, itself, will not be

22. "The primary use of streets is use by the public for travel and transportation, and the general rule is that any obstruction of a street or encroachment thereon which interferes with such use is a public nuisance. But there are exceptions to the general rule born of necessity and justified by public convenience. An abutting owner engaged in building may temporarily encroach upon the street by the deposit of building materials. A tradesman may convey goods in the street to or from his adjoining store. A coach or omnibus may stop in the street to take up or set down passengers, and the use of a street for public travel may be temporarily interfered with in a variety of other ways without the creation of what in the law is deemed to be a nuisance. But all such interruptions and obstructions of streets must be justified by necessity. It is not sufficient, however, that the obstructions are necessary with reference to the business of

him who erects and maintains them. They must also be reasonable with reference to the rights of the public who have interests in the streets which may not be sacrificed or disregarded. Whether an obstruction in the street is necessary and reasonable must generally be a question of fact to be determined upon the evidence relating thereto." *Callanan v. Gilman*, 107 N. Y. 360.

23. *Callanan v. Gilman*, 107 N. Y. 360; *Richardson, etc., Co. v. Barstow Stove Co.*, 11 N. Y. Supp. 935, 26 Abb. N. Cas. 150, affirmed, 36 St. Rep. 983, 13 N. Y. Supp. 358.

24. *Carpenter v. Gwynn*, 35 Barb. 395.

25. *Simis v. Brookfield*, 13 Misc. 569, 63 St. Rep. 738, 34 N. Y. Supp. 695.

26. *Flood v. VanWormer*, 147 N. Y. 284.

27. *Ackerman v. True*, 175 N. Y. 354; *Ackerman v. True*, 71 App. Div. 143, 75 N. Y. Supp. 695, reversed on other grounds, 175 N. Y. 353; *Levy*

permitted to erect a building which encroaches on the public highway.²⁸ The removal of the encroachment may be enforced by a mandatory injunction.²⁹ The maintenance of appurtenances, such as awnings,³⁰ show windows, bay windows,³¹ or similar encroachments, extending over the sidewalk, may be enjoined.

3. Railroads.

Equity will assume jurisdiction of an action to restrain the illegal acts of a railroad corporation in laying or maintaining its tracks along or across a public highway.³² Such a situation presents elements of irreparable damage, continuous trespass, a multiplicity of suits and a public or private nuisance, any one of which may justify injunctive relief.³³

A railroad must secure the consent of a city for the maintenance of a railroad across or along a city street; and outside of city limits it must secure an order of the Supreme Court before it can use a part of the highway for its tracks.³⁴ The consent of the Public Service Commission is also to be

v. Murray, 56 Misc. 354, 106 N. Y. Supp. 689; *Brown-Brand Realty Co. v. Saks & Co.*, 126 Misc. 336, 214 N. Y. Supp. 230, affirmed, 218 N. Y. Supp. 706; *Purroy v. Schuyler*, 15 St. Rep. 337.

28. *Hellinger v. New York*, 181 App. Div. 254, 168 N. Y. Supp. 271.

29. *Ackerman v. True*, 175 N. Y. 354; *Brown-Brand Realty Co. v. Saks & Co.*, 126 Misc. 336, 214 N. Y. Supp. 230, affirmed, 218 N. Y. Supp. 706.

30. *Brown-Brand Realty Co. v. Saks & Co.*, 126 Misc. 336, 214 N. Y. Supp. 230, affirmed, 218 N. Y. Supp. 706; *Farrell v. New York*, 5 N. Y. Supp. 580, 22 St. Rep. 469.

31. *Ackerman v. True*, 71 App. Div. 143, 75 N. Y. Supp. 695, reversed on other grounds, 175 N. Y. 353.

A tenant on the third story of a building may maintain an action to obtain the removal of a structure of iron work and glass extending six feet from the building into the sidewalk used by passers-by and those seeking

entrance to plaintiff's premises and which was unincumbered when plaintiff's tenancy commenced. *Levy v. Murray*, 56 Misc. 354, 106 N. Y. Supp. 689.

32. *Williams v. New York Cent., etc., R. Co.*, 16 N. Y. 97; *Lamming v. Galusha*, 135 N. Y. 239; *People v. N. Y., etc., R. Co.*, 45 Barb. 73, 26 How. Pr. 44.

Laches of the plaintiff may bar injunctive relief. *Danner v. New York, etc., R. Co.*, 152 App. Div. 405, 137 N. Y. Supp. 270, affirmed, 213 N. Y. 117.

33. *Milbau v. Sharp*, 27 N. Y. 611; *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423; *Lamming v. Galusha*, 135 N. Y. 239; *Olivella v. N. Y. & Harlem R. Co.*, 31 Misc. 203, 64 N. Y. Supp. 1086, affirmed, 51 App. Div. 612, 64 N. Y. Supp. 1145; *Wetmore v. Story*, 22 Barb. 414, 3 Abb. Pr. 262; *Wiliken v. West Brooklyn R. Co.*, 17 St. Rep. 654, 1 N. Y. Supp. 791.

34. *Railroad Law*, § 21.

secured.³⁵ Injunction is an appropriate remedy in case the railroad is not thus authorized to construct its line.³⁶ The public authorities, or any one specially affected by the unauthorized use of the highway, may have injunctive relief against the nuisance.³⁷ An abutting owner, although he does not own any part of the fee to the street, may enjoin the unauthorized use of the public highway.³⁸

In addition to the consent of the officials, the railroad must acquire the consent of the abutting owners, or it may be subjected to action by them.³⁹ This is particularly true, when the abutting owner owns the fee to the highway, for the maintenance of a railroad is an additional servitude upon the easement granted for highway purposes, and may thus be restrained.⁴⁰ Such additional burden cannot be placed upon the highway, either by legislative or municipal authority, without making compensation therefor to the

35. *People v. Delaware & Hudson Co.*, 228 N. Y. 279.

36. *Milhau v. Sharp*, 27 N. Y. 611; *Village of Bolivar v. Pittsburgh, Shawmut, etc.*, R. Co., 88 App. Div. 387, 84 N. Y. Supp. 678, affirmed, 179 N. Y. 523; *People v. N. Y., etc., R. Co.*, 45 Barb. 73, 26 How. Pr. 44; *People v. Hudson River R. Co.*, 2 Abb. Pr. 249, 32 How. Pr. 394; *Osborne v. Jersey City & Albany Ry. Co.*, 27 Hun 589.

37. *Uline v. New York Cent., etc.*, R. Co., 101 N. Y. 98; *Lamming v. Galusha*, 135 N. Y. 239; *Hatfield v. Straus*, 189 N. Y. 208; *Village of Bolivar v. Pittsburgh, Shawmut, etc.*, R. Co., 88 App. Div. 387, 84 N. Y. Supp. 678, affirmed, 179 N. Y. 523; *Wetmore v. Story*, 22 Barb. 414, 3 Abb. Pr. 262; *Wiliken v. West Brooklyn R. Co.*, 17 St. Rep. 654, 1 N. Y. Supp. 791.

The State may maintain a suit to restrain the unauthorized obstruction of the public highways. *People v. New York, etc.*, R. Co., 45 Barb. 73, 26 How. Pr. 44.

Highway commissioners could main-

tain the action. *Osborne v. Jersey City & Albany Ry. Co.*, 27 Hun 589.

38. *Hatfield v. Straus*, 189 N. Y. 208; *Stanley v. Jay Street Connecting R. Co.*, 100 Misc. 493, 166 N. Y. Supp. 119.

39. *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; *Murdock v. Prospect Park, etc.*, R. Co., 73 N. Y. 579.

Consent of abutting owner.—If the railroad receives the express consent and license of the abutting owner for the construction of the railroad along the highway, an injunction will not be granted. *Murdock v. Prospect Park, etc.*, R. Co., 10 Hun 598.

40. *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; *Broiestedt v. South Side R. Co. of L. I.*, 55 N. Y. 220; *Murdock v. Prospect Park, etc.*, R. Co., 73 N. Y. 579; *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423; *Olivella v. N. Y. & Harlem R. Co.*, 31 Misc. 203, 64 N. Y. Supp. 1086, affirmed, 51 App. Div. 612, 64 N. Y. Supp. 1145; *Bradley v. Degnon Contracting Co.*, 80 Misc. 90, 140 N. Y. Supp. 825, affirmed, 157 App. Div. 237, 141 N. Y. Supp. 852; *Fanning v. Osborne*, 34 Hun 121, modified, 102 N. Y. 441.

owner.⁴¹ But, in such a case, unless the railroad has acted in bad faith, the interests of the public may demand that the operation of trains be continued, and equity will award damages in lieu of equitable relief, or suspend the operation of an injunction until the railroad has condemned the easement.⁴² After the operation of the road has commenced, equitable relief will seldom be granted.⁴³

Although an abutting owner does not have any title to the fee of a city street, the use of the street for railroad purposes may interfere with his rights of light, air and access; and these rights will be protected by a court of equity. The protection he receives, however, is usually in the form of money damages, rather than interference with the railroad.⁴⁴

4. Street railways.

Upon principles similar to those applying to the location of steam railroads in a public highway, the unauthorized use of highway by a street railway company will be restrained. Under section 171 of the Railroad Law, a street railway must secure the consent of the local authorities and also of one-half or two-thirds of the property owners. All necessary preliminary steps must be taken by the company.⁴⁵ In the absence of such preliminaries, the construction of the road may be restrained by a court of equity;⁴⁶ either at the suit of the municipal authorities or of an abutting

41. *Williams v. New York Cent. R. Co.*, 16 N. Y. 97; *Bradley v. Degnon Contracting Co.*, 80 Misc. 90, 140 N. Y. Supp. 825, affirmed, 157 App. Div. 237, 141 N. Y. Supp. 852.

42. *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423.

43. *Hentz v. Long Island R. Co.*, 13 Barb. 646.

44. *Pratt v. N. Y. Cent., etc., R. Co.*, 90 Hun 83, 35 N. Y. Supp. 557.

45. *Henning v. Hudson Valley R. Co.*, 90 App. Div. 492, 85 N. Y. Supp. 1111.

Location of route.—Where a street railroad corporation, proceeding under the Railroad Law, has not, either by its articles of association or by formal and valid extension proceedings, lo-

cated a route upon an avenue, it has no capacity to receive the consent of the local authorities as to such avenue or to exercise its franchise thereon. *McClean v. Westchester Electric Ry. Co.*, 25 Misc. 383, 55 N. Y. Supp. 556.

46. *Irvine v. Atlantic Ave. R. R. Co.*, 10 App. Div. 560, 42 N. Y. Supp. 1103; *Tiedemann v. Staten Island Midland R. Co.*, 18 App. Div. 368, 46 N. Y. Supp. 64; *Henning v. Hudson Valley R. Co.*, 90 App. Div. 492, 85 N. Y. Supp. 1111; *Merriman v. Utica Belt Line Street Car Co.*, 18 Misc. 269, 41 N. Y. Supp. 1049; *McClean v. Westchester Electric Ry. Co.*, 25 Misc. 383, 55 N. Y. Supp. 556; *Loomis v. Thirty-fourth St. R. Co.*, 38 Hun 517.

owner.⁴⁷ In such a case it is immaterial whether the abutting owner has any title to the fee of the highway.⁴⁸

The general rule in United States is that a street railway is not an additional burden on an easement granted for highway purposes. But the courts in the State of New York have always adhered to a contrary doctrine. It is here held that, if an adjoining owner owns the fee of the street subject to the easement for general highway purposes, a street railway cannot be constructed along the street without his consent.⁴⁹ Equity will enforce the rights of the abutting owner;⁵⁰ but, owing to the public interests involved in the

47. *Irvine v. Atlantic Ave. R. R. Co.*, 10 App. Div. 560, 42 N. Y. Supp. 1103; *Tiedemann v. Staten Island Midland R. Co.*, 18 App. Div. 368, 46 N. Y. Supp. 64; *Henning v. Hudson Valley R. Co.*, 90 App. Div. 492, 85 N. Y. Supp. 1111; *Manton v. South Shore Traction Co.*, 121 App. Div. 410, 106 N. Y. Supp. 82; *McClellan v. Westchester Electric Ry. Co.*, 25 Misc. 383, 55 N. Y. Supp. 556; *Webb v. Forty-second Street, etc., R. Co.*, 52 Misc. 46, 102 N. Y. Supp. 762; *Milhaw v. Sharp*, 28 Barb. 228, 7 Abb. Pr. 220.

Sale of franchise.—An abutting owner can not maintain an action to enjoin the municipal authorities from selling a street railway franchise on the ground of alleged illegality of the proposed sale; such owner has no standing in court before the actual construction of the road is threatened. *Abraham v. Meyers*, 29 Abb. N. C. 384, 23 N. Y. Supp. 225.

No injury.—An individual who will sustain no injury from the proposed acts of a street railway, is not entitled to injunctive relief. *Ingersoll v. Nassau Electric R. Co.*, 89 Hun 213, 69 St. Rep. 16, 34 N. Y. Supp. 1044.

Suit by taxpayer.—A suit does not lie in favor of a resident and taxpayer of the city who does not own real estate on the street where the railway is proposed to be laid, and to whom it will not be specially injurious to prevent its construction. And where

the action to prevent the construction of the railway was brought by such a party, and the court at the trial, after all the evidence was given, held that he could not maintain the action, and made an order permitting the attorney-general to be added as a party plaintiff, and then gave judgment for the relief prayed; **Held**, that this order was reviewable by this court; and **Held**, further, that the amendment was not authorized by the Code, and the order was therefore erroneous. Any unauthorized continuous obstruction of a public highway or street is a public nuisance. But that which is authorized by competent legal authority cannot, in law, constitute a nuisance. *Davis v. New York*, 14 N. Y. 506.

48. *Henning v. Hudson Valley R. Co.*, 90 App. Div. 492, 85 N. Y. Supp. 1111; *Merriman v. Utica Belt Line Street Car Co.*, 18 Misc. 269, 41 N. Y. Supp. 1049.

49. *Duncan v. Nassau Electric R. Co.*, 127 App. Div. 252, 111 N. Y. Supp. 210; *Shaw v. Rochester, Syracuse, etc., R. R. Co.*, 131 App. Div. 528, 115 N. Y. Supp. 1026; *People v. Law*, 34 Barb. 494, 22 How. Pr. 109.

50. *Beekman v. Third Ave. R. Co.*, 13 App. Div. 279, 43 N. Y. Supp. 174, affirmed, 153 N. Y. 144; *Paige v. Schenectady R. Co.*, 77 App. Div. 571, 79 N. Y. Supp. 266; *People v. Law*, 34 Barb. 494, 22 How. Pr. 109; *American Bank Note Co. v. N. Y. Elevated*

maintenance of railway traffic, may, in lieu of injunctive relief, award damages to the abutting owner.⁵¹ If the company has deliberately constructed the road with knowledge of the abutting owner's rights, an injunction may be sustained.⁵² If he has been guilty of laches, equitable relief will be denied,⁵³ but he may safely wait until the company has done some act which is likely to produce injury to his premises.⁵⁴

5. Elevated railroads.

An abutting owner has an easement of light, air and access in the street, and an elevated railroad cannot infringe this right without his consent.⁵⁵ His right may be protected by

R. R. Co., 59 Super. Ct. (27 J. & S.) 175, 37 St. Rep. 885, 13 N. Y. Supp. 626.

Allegation as to construction of railway.—In an action to enjoin the construction of a street railway in the highway in front of plaintiff's premises, an allegation by the plaintiff in her complaint that she owns to the center of the highway is insufficient, unless coupled with an allegation that defendant is about to build its route along the side of the street on which the plaintiff's premises are situated. *Roberts v. Huntington R. Co.*, 56 Misc. 62, 105 N. Y. Supp. 1031.

Extent of injunction.—Where the owner does not show the territorial extent to which he is entitled to have the operation of the railroad restrained, the injunction should be limited so as to restrain the construction of the road only in that portion of the street which is directly in front of his premises. *Beekman v. Third Ave. R. Co.*, 13 App. Div. 279, 43 N. Y. Supp. 174, affirmed, 153 N. Y. 144.

51. *Duncan v. Nassau Electric R. Co.*, 127 App. Div. 252, 111 N. Y. Supp. 210.

52. "Although the defendants have proceeded to construct their line through this street, they knew that if the plaintiff was the owner to the

center thereof they were trespassers in so doing. They deliberately expended their money, and took the risk of establishing that the plaintiff had no such ownership. It is not quite accurate to claim that they were compelled to build on each owner's land in order to get the question of ownership before the court. A threat to build, or very slight and inexpensive work, on the land of any one of such adjacent owners would have compelled a suit to enjoin it, and the moment such action was commenced the question of ownership as to all could have been tried and determined. We discover no particular equity in the position which the defendant has assumed in this case, and while we are not disposed to grant a mandatory injunction requiring it to remove from the plaintiff's land what it has already unlawfully placed thereon, we do restrain it from using the same, or from any further equity thereon." *Paige v. Schenectady R. Co.*, 77 App. Div. 571, 79 N. Y. Supp. 266.

53. *Shaw v. Rochester, Syracuse, etc., R. R. Co.*, 131 App. Div. 528, 115 N. Y. Supp. 1026

54. *Beekman v. Third Ave. R. Co.*, 13 App. Div. 279, 43 N. Y. Supp. 174, affirmed, 153 N. Y. 144.

55. *Story v. N. Y. Elevated R. Co.*,

a court of equity.⁵⁶ After the completion of the original construction, an enlargement of the road may likewise be restrained.⁵⁷ Property damage is an essential element in the action; and, if appears that the plaintiff's premises

90 N. Y. 122; *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132; *Thompson v. Manhattan R. Co.*, 130 N. Y. 360; *Hunter v. Manhattan R. Co.*, 141 N. Y. 281.

56. *Story v. N. Y. Elevated R. Co.*, 90 N. Y. 122; *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436; *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; *Thompson v. Manhattan R. Co.*, 130 N. Y. 360; *Bremer v. Manhattan Ry. Co.*, 191 N. Y. 333; *Weill v. Metropolitan R. Co.*, 10 Misc. 72, 30 N. Y. Supp. 833, 24 N. Y. Civ. Proc. 85, 1 N. Y. Ann. Cas. 40; *Leffmann v. Long Island R. Co.*, 47 Misc. 169, 93 N. Y. Supp. 647, reversed, 120 App. Div. 528, 105 N. Y. Supp. 487, affirmed, 197 N. Y. 513; *American Bank Note Co. v. N. Y. Elevated R. Co.*, 59 Super. Ct. (27 J. & S.) 175, 37 St. Rep. 885, 13 N. Y. Supp. 626. "The right of abutting owners to damages for an invasion of their rights in the public streets is predicated upon the constitutional guarantees that no person shall be deprived of life, liberty or property without due process of law, or have his property taken for public use without just compensation." *Galway v. Metropolitan Elev. R. Co.*, 128 N. Y. 132.

Structure within intersecting streets.—On the ground that it is an unlawful interference with his street easements of light, air and access, the owner of a corner building on Third avenue in the city of New York, along which is operated an elevated railway, may be granted an injunction to restrain the continuance by the railway company of the construction of a signal tower and storage platform with a support column in the sidewalk at the street intersection, though such

structure is being built wholly within the lines of the intersecting streets, so that if the boundary lines of plaintiff's property were projected to the east across Third avenue or to the south across the intersecting street they would not in either case touch any portion of the structure of which complaint is made. *Welsh v. Interborough Rapid Transit Co.*, 100 Misc. 122, 165 N. Y. Supp. 272.

The Statute of Limitations is no defense, as the trespass is continuous, and the action can be commenced at any time. *Galway v. Metropolitan Elev. R. Co.*, 128 N. Y. 132; *Knox v. Metropolitan Elev. R. Co.*, 58 Hun 517, 12 N. Y. Supp. 848, 36 St. Rep. 2, affirmed without opinion, 128 N. Y. 625. But past damages for only six years can be recovered. *Kearney v. Metropolitan Elev. Ry. Co.*, 14 St. Rep. 854.

57. *Rothschild v. Interborough Rapid Transit Co.*, 162 App. Div. 532, 147 N. Y. Supp. 1040.

Increase in traffic on elevated.—Where, in an action brought by the plaintiff's predecessor in title, in which he had recovered the usual abutting owner's judgment against the defendant corporation, it was found, among other things, that the only interests or property rights of the plaintiffs in said street taken, appropriated or interfered with by the defendant were the easements of light, air and access in and over the street in front of their premises; an increase in the number and speed of the trains in front of plaintiff's premises would not constitute a legitimate cause for grievance on her part for which she might assert an injury and consequent damage. *Wolf v. Manhattan R. Co.*, 51 Misc. 426, 101 N. Y. Supp. 493.

have increased in value after the construction of the road commensurate with the general increase of values in the community, equitable relief may be denied.⁵⁸ The court, in its discretion, may refuse equitable relief, when there has been a long delay in asserting the right.⁵⁹

The abutting owner's right may be asserted by a remainderman of the premises.⁶⁰ One acquiring title to the premises after the building of the road may maintain the action;⁶¹ but can recover as incidental damages only those which accrued after his acquisition of title. The grantor, in such a case, will not have injunctive relief, but may recover the damages he sustained prior to his conveyance.⁶² If a deed reserves to the grantor the damages caused by the erection of the structure, he may recover them.⁶³ All persons having an interest in a particular parcel may be joined as party plaintiffs;⁶⁴ but the owners of distinct parcels cannot join in the same action.⁶⁵ The judgment usually provides for an injunction,⁶⁶ with a provision permitting the company to avoid this burden upon payment to the owner of the value of the easement taken.⁶⁷ The amount of these damages may be ascertained in the action, and the plaintiff

58. *Gray v. Manhattan R. Co.*, 128 N. Y. 499; *Adler v. Metropolitan El. R. Co.*, 138 N. Y. 173; *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347; *Rorke v. Kings County Elevated R. Co.*, 22 App. Div. 511, 48 N. Y. Supp. 42; *Hoffman v. Manhattan El. R. Co.*, 1 Misc. 155, 20 N. Y. Supp. 625; *Purdy v. Manhattan Elevated R. Co.*, 36 St. Rep. 43, 13 N. Y. Supp. 295; *Brush v. Manhattan Ry. Co.*, 44 St. Rep. 111, 17 N. Y. Supp. 540; *Rich v. Manhattan Ry. Co.*, 46 St. Rep. 673, 19 N. Y. Supp. 543. See also, *Jamison v. Kings County Elevated Ry. Co.*, 147 N. Y. 322.

59. *Knott v. Manhattan R. Co.*, 187 N. Y. 243.

60. *Thompson v. Manhattan R. Co.*, 130 N. Y. 360; *Macy v. Metropolitan El. R. Co.*, 59 Hun 365, 12 N. Y. Supp. 804, affirmed without opinion, 128 N. Y. 624.

61. *Pappenheim v. Metropolitan El. R. Co.*, 128 N. Y. 436; *Glover v. Man-*

hattan Ry Co., 51 Super. Ct. (19 J. & S.) 1; *American Bank Note Co. v. N. Y. Elevated R. R. Co.*, 59 Super. Ct. (27 J. & S.) 175, 37 St. Rep. 885, 13 N. Y. Supp. 626.

62. *Pappenheim v. Metropolitan Elev. R. Co.*, 128 N. Y. 436; *VanAllen v. New York El. R. Co.*, 144 N. Y. 174; *Pegram v. New York El. R. Co.*, 147 N. Y. 135.

63. *Berry v. New York Municipal R. Corp.*, 111 Misc. 432, 183 N. Y. Supp. 632, affirmed, 198 App. Div. 900, 136 N. Y. Supp. 934.

64. *Shepard v. Manhattan R. Co.*, 117 N. Y. 442.

65. *Moran v. Lydecker*, 27 Hun 582, 11 Abb. N. C. 298.

66. *Bremer v. Manhattan Ry. Co.*, 191 N. Y. 333.

67. *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347; *Leffman v. Long Island R. Co.*, 47 Misc. 169, 93 N. Y. Supp. 647, reversed, 120 App. Div. 528, 105 N. Y. Supp. 487, affirmed, 197 N. Y.

may be directed to convey the easement to the company upon the payment of such award.⁶⁸ The plaintiff may also recover past damages which he has sustained up to the time of the trial of the action.⁶⁹ These damages are usually based on loss of rental value.⁷⁰

6. Subways.

The construction or maintenance of a subway under the surface of ground privately owned constitutes a continuous trespass within the jurisdiction of a court of equity. Even though the proprietor of the abutting premises does not own the fee to the street under which the subway is constructed, he is entitled to lateral support for his lands.⁷¹ The public benefit, however, which accrues to the inhabitants of the city, may induce a court to deny equitable relief, and require a complainant to resort to a remedy for damages.⁷² Thus, equitable relief may be denied, where the owners abutting a street under which a subway is being constructed seek to restrain the contractors from entering their private premises for the purpose of underpinning the buildings erected thereon.⁷³ The controversy being within the jurisdiction of equity, the court may determine the damages to be awarded to the owner.⁷⁴

513; *Kearney v. Metropolitan Elevated Ry. Co.*, 14 St. Rep. 854; *Glover v. Manhattan Ry. Co.*, 51 Super. Ct. (19 J. & S.) 1.

Extension of time for condemnation.—Where application is made to suspend the operation of an injunction against an elevated railroad pending proceedings for condemnation, the applicant must show that such proceedings were commenced without unreasonable delay and are prosecuted with reasonable diligence. Where it appears that there has been no unnecessary delay in instituting and prosecuting the proceedings, and that without fault on its part the railroad company is unable to complete them within the period fixed, the court may, in its discretion, grant such further time as may be necessary. *Jacquelin v. Manhattan Ry. Co.*, 9 Misc. 329, 60 St. Rep. 613, 29 N. Y. Supp. 1113.

68. *Papenheim v. Metropolitan Elev. R. Co.*, 128 N. Y. 436.

69. *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; *McGean v. Metropolitan El. R. Co.*, 133 N. Y. 9; *Hunter v. Manhattan R. Co.*, 141 N. Y. 281; *Van Allen v. New York El. R. Co.*, 144 N. Y. 174; *Kearney v. Metropolitan Elev. R. Co.*, 14 St. Rep. 854.

70. *Kearney v. Metropolitan Elevated Ry. Co.*, 14 St. Rep. 854.

71. *Brooklyn Trust Co. v. City of New York*, 198 App. Div. 595, 190 N. Y. Supp. 812, affirmed, 234 N. Y. 520.

72. *March v. New York*, 69 App. Div. 1, 74 N. Y. Supp. 630; *Hodgkinson v. Long Island R. Co.*, 4 Edw. Ch. 411.

73. *March v. New York*, 69 App. Div. 1, 74 N. Y. Supp. 630.

74. *Brooklyn Trust Co. v. City of New York*, 198 App. Div. 595, 190 N. Y. Supp. 812, affirmed, 234 N. Y. 520.

7. Underground conduits.

The use of a part of the street for underground conduits, although it may technically be a trespass, is usually of such slight injury to an abutting owner, that equity will not intervene in his behalf.⁷⁵ He will be required to seek a remedy for damages in an action at law.⁷⁶ But a public utility corporation having a right to maintain its pipes, wires or other appurtenances in a conduit, may be protected by injunctive relief against unauthorized acts which are likely to cause injury to its system.⁷⁷ But, if the plaintiff's franchise to the use of the street is not exclusive, it cannot complain that other companies are likewise using the street, although some damage is thereby occasioned to the plaintiff.⁷⁸

8. Telephone and telegraph lines.

The use of a street by a telephone or telegraph company for its poles and wires is an additional servitude upon the owner of the fee; and he may restrain such use when it is exercised without his consent.⁷⁹ The use of the street, however, by an electric company lighting the highway, may be a proper highway use, so that the owner of the fee is entitled to no relief. Although the electric company is not lighting the street, an abutting owner who does not own any part of the fee of the street and who has sustained no damage by reason of the maintenance of electric equipment, is not entitled to injunctive relief.⁸⁰

9. Bridges.

The unauthorized construction of a bridge across a highway may be restrained by any one specially injured thereby.

75. *Castle v. Bell Tel. Co.*, 30 Misc. 38, 61 N. Y. Supp. 743, affirmed, 49 App. Div. 437, 63 N. Y. Supp. 482; *Crooke v. Flatbush Waterworks Co.*, 27 Hun 72.

76. *Crooke v. Flatbush Waterworks Co.*, 27 Hun 72.

77. *Rochester & Lake Ontario Water Co. v. City of Rochester*, 176 N. Y. 36; *New York Pneumatic Service Co. v. Cox Contracting Co.*, 187 App. Div. 1, 175 N. Y. Supp. 153.

78. *Western Union Tel. Co. v. Syra-*

cuse Electric Light, etc., Co., 178 N. Y. 325. See also, *Empire City Subway Co. v. Broadway & Seventh Ave. R. Co.*, 87 Hun 279, 67 St. Rep. 741, 33 N. Y. Supp. 1055, affirmed on opinion below, 159 N. Y. 555.

79. *Osborne v. Auburn Telep. Co.*, 189 N. Y. 393; *Tiffany v. U. S. Illuminating Co.*, 51 Super. Ct. (19 J. & S.) 280.

80. *Cooperstone v. Brooklyn Edison Co., Inc.*, 128 Misc. 216, 219 N. Y. Supp. 11.

Thus the owner of the fee of a street, although subject to the public easement of travel, may maintain an action to restrain a railroad from building a bridge over the street without his consent.⁸¹ But, one who does not own the fee to the street, although he is a nearby owner, cannot restrain a city from erecting a bridge over the road.⁸²

The owner of a toll bridge may have injunctive relief against an apprehended injury to his property.⁸³ A railroad bridge may, at the suit of the company, be protected from an unwarranted invasion.⁸⁴

10. Laying out or improvement of highways.

A court of equity will not permit a municipality to enter the premises of a private person and lay out and build

81. *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451.

82. *Saladier v. New York*, 185 N. Y. 408.

Municipality.—An action will not lie to restrain the erection, for public purposes, by a city corporation, of a bridge within the limits of the city, upon one of the streets thereof, and at the suit of a landowner whose property is not taken or touched. In such a case, the landowner is not entitled to compensation for the indirect or consequential damages arising or apprehended from the exercise of the power of eminent domain. And an injunction should not be granted until the final hearing, when the subject of compensation can be considered, especially where the defendant is able to respond, in case the plaintiff shall establish a legal claim to damages. *Swett v. Troy*, 62 Barb. 630.

83. *Rexford Flats Bridge Co. v. Canal Board*, 81 Misc. 330, 142 N. Y. Supp. 913.

Condemnation by state.—An order enjoining the Canal Board from destroying a toll bridge owned by the plaintiff should be vacated where, pursuant to authority given by the statute subsequently enacted, the state has condemned the plaintiff's rights

and franchises in said bridge. *Halfmoon Bridge Co. v. Canal Board*, 163 App. Div. 76, 148 N. Y. Supp. 531, modified on other grounds, 213 N. Y. 160. See also, *Halfmoon Bridge Co. v. Acme Constr. Co.*, 157 App. Div. 183, 141 N. Y. Supp. 365.

84. *Niagara Falls, etc., Bridge Co. v. Grand Trunk Ry. Co.*, 241 N. Y. 85.

Canal construction.—A railroad company is entitled to a judgment restraining the state from raising, trespassing upon or interfering with a railroad bridge over a stream used for and in the construction and improvement of the barge canal unless either the state constructs a new bridge and approaches thereto or appropriates for the canal the bridge and its approaches in the manner prescribed by the statute. The company is not entitled, however, to be compensated for loss or damages by interference with its business in the conduct of its railroad caused by the proper and necessary substitution of a new bridge for the old, or to compensation in advance of the appropriation or disturbance of the bridge, and a judgment providing for such compensation is erroneous and should be modified to conform with the statute. *Lehigh Valley R. Co. v. Canal Bd.*, 204 N. Y. 471.

a highway through such premises, without proper judicial proceedings or the consent of the owner.⁸⁵ Injunction is a proper remedy for the protection of the owner's rights,⁸⁶ although the action may develop into a proceeding for the determination of the amount of damages to be paid to the owner.⁸⁷ But an injunction is seldom a proper remedy to raise the question as to the regularity of the proceedings for the opening of a street.⁸⁸ The relief for a change of grade of a highway is for damages under the statutory provisions relating thereto.⁸⁹ The right to damages for a change of grade is a creation of statute, and hence the statutory remedy is exclusive.⁹⁰

11. Cutting trees.

An abutting owner having an interest in the fee of the street, may properly maintain shade trees within the highway bounds, and an injunction may be granted to restrain an unwarranted injury to such trees.⁹¹ On the other hand, the paramount use of the highway is for public travel, and the municipal authorities may in the interests of traffic cut or trim trees along the highway.⁹²

12. Damage to highway.

In a proper case, the aid of equity may be invoked for the protection of a public highway.⁹³ Equity will forbid an

85. Railroad lands.—Highway commissioners sought to acquire lands for highway purposes acquired by railroad company for depot purposes by proceedings under Chap. 56, Laws of 1830. **Held**, that an injunction was proper remedy, as the highway could not be opened through plaintiff's lands without its consent. *Prospect Park, etc., R. Co. v. Williamson*, 18 Week. Dig. 257.

86. Stillman v. Olean, 184 App. Div. 323, 171 N. Y. Supp. 445, reversed on other grounds, 228 N. Y. 322.

87. Stillman v. Olean, 184 App. Div. 323, 171 N. Y. Supp. 445, reversed on other grounds, 228 N. Y. 322.

88. Wiggin v. Mayor, etc., of N. Y., 9 Paige 16.

89. See Highway Law, § 59; Second

Class Cities Law, § 99; Village Law, § 159.

90. Hoy v. Salamanca, 57 Misc. 81, 107 N. Y. Supp. 208.

91. Evans v. Hudson Street Comrs., 84 Hun 206, 32 N. Y. Supp. 547.

92. St. Mary of the Angels Church v. Barrows, 68 Misc. 545, 124 N. Y. Supp. 571.

93. Heavy loads.—This court will not interfere to stay vehicles with heavy loads from passing over a public wooden bridge; but must leave the parties to law. Although the court interferes to prevent irreparable injury, still it does not do so where damages can be ascertained at law, and compensation can be made in money. *Thompson v. Matthews*, 2 Edw. Ch. 212.

abutting owner from making an excavation on his lands which will remove the lateral support of the highway and cause damage thereto. Such an action may be maintained by the municipality having charge of the highway,⁹⁴ or by a nearby owner who is specially damaged thereby.⁹⁵ One may be restrained from making an excavation in the highway, where he has no authority so to do.⁹⁶ And he may be required to restore the road to its former condition.⁹⁷

J. Waters and watercourses.

1. In general.

A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alteration in quality or unreasonable diminution in quantity. While he does not own the running water, he has the right to a reasonable use of it as it passes by his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of the others to have the stream substantially preserved in its natural size, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others, and the maxim of *sic utere tuo*, observed by all. The rule of the ancient common law is still in force: *aqua currit et debet currere, ut currere solebat*. Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation when not out of proportion to the size of the stream, and some other familiar uses, although in fact a diversion of the water involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners. As the enjoyment of each must be according to his opportunity and the upper owner has the first chance, the lower owners must submit

94. *City of Troy v. Murray*, 128 Misc. 419, 219 N. Y. Supp. 681.

95. *Melburn v. Fowler*, 27 Hun 568.

96. *Rochester Savings & Loan Assn.*

v. Gorman, 21 Misc. 394, 47 N. Y. Supp. 81.

97. *Rochester Savings & Loan Assn.*

v. Gorman, 21 Misc. 394, 47 N. Y. Supp. 81.

to such loss as is caused by reasonable use. Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business and the indispensable public necessity of cities and villages for drainage, are also taken into consideration, so that a use which under certain circumstances, is held reasonable, under different circumstances would be held unreasonable.⁹⁸

The question of reasonable use is generally a question of fact,⁹⁹ but whether the undisputed facts, and the necessary inferences therefrom, establish an unreasonable use, is a question of law.¹ A diversion or a pollution which obviously is of substantial damage to the lower proprietor may, as a matter of law, be unreasonable.²

2. Diversion.

Each riparian owner along a living stream of water has a right to a reasonable use thereof for irrigation, domestic, or industrial purposes.³ If he exceeds his right to a reasonable use and thereby diverts the stream, or a part thereof, from the lower proprietor, the latter has his remedy. A riparian proprietor may insist that the stream shall flow to his land in the usual quantity, and at its natural place and height. An upper proprietor may use the water while it runs over his land, but he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate.⁴ It is within

98. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303.

99. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303.

1. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303.

2. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303.

3. *Parry v. Citizens' Water Works Co.*, 59 Hun 196, 37 St. Rep. 715, 13 N. Y. Supp. 471.

4. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Amsterdam Knitting Co. v. Dean*, 13 App. Div. 42, 43 N. Y. Supp. 29, affirmed, 162 N. Y. 278.

Change in course.—Where the effect of an embankment, placed in a stream by an upper proprietor, is to change

the natural course of its waters, making them to pass down on the easterly instead of the westerly side of an island, and to cause them to flow more rapidly into the mill pond of a lower proprietor, and to carry a greater amount of floating debris against his bulkhead, the lower proprietor, although he receives the same amount of water as before, and, except as above stated, has sustained no actual damage, by reason of the diversion of the waters of the stream, is entitled to nominal damages and to equitable relief in the form of a mandatory injunction for the removal of the embankment and for the restoration of the stream to its natural course. Am-

the power of a court of equity to determine the reasonableness of a certain use, and to restrain by injunction an improper diversion.⁵ The grounds for equitable interposition in such a case are two-fold: First, the inadequacy of any legal remedy to secure the party in the enjoyment of his right to have the water flow in its natural channel. Second, to prevent a multiplicity of suits for damages accruing from the daily and continuous wrongful diversion of the stream.⁶ Equity may act by mandatory injunction, and compel the restoration of the diverted waters to their natural channel.⁷

sterdam Knitting Co. v. Dean, 13 App. Div. 42, 43 N. Y. Supp. 29, affirmed, 162 N. Y. 278.

5. *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Amsterdam Knitting Co. v. Dean*, 13 App. Div. 42, 43 N. Y. Supp. 29, affirmed, 162 N. Y. 278; *Knauth v. Erie Railroad Co.*, 219 App. Div. 83, 219 N. Y. Supp. 206; *Emery v. Erskine*, 66 Barb. 9; *Smith v. City of Rochester*, 38 Hun 612, affirmed without opinion, 104 N. Y. 674; *Wright v. Syracuse, etc., R. Co.*, 49 Hun 445, 3 N. Y. Supp. 480, 23 St. Rep. 78, affirmed without opinion, 124 N. Y. 668; *Gilzinger v. Saugerties Water Co.*, 66 Hun 173, 49 St. Rep. 308, 21 N. Y. Supp. 121, affirmed on opinion below, 142 N. Y. 633; *Belknap v. Belknap*, 2 Johns. Ch. 463; *Patterson v. More*, 14 Week. Dig. 561.

Mohawk river.—As the right of riparian owners on the Mohawk river who do not own the bed thereof to compensation for damages caused by changes in the river channel authorized by chapter 93 of the Laws of 1891, depends wholly upon the statute, they can enforce their rights to damages only by the procedure provided in the statute. That remedy is exclusive; a suit to restrain the commissioners from making the contemplated im-

provements does not lie. *Lee v. Childs*, 140 App. Div. 699, 125 N. Y. Supp. 571.

A grantee of a water right for one purpose may be restrained from using the water for another purpose. *Wells v. Chapman*, 13 Barb. 561.

6. *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191. "The true reason for the interposition of equity in such cases, is that the remedy at law, is imperfect, and the remedy of equity gives effectual justice. Suits at law afford a species of redress; but as they may have no end, they also afford scope for perverse litigation, which may become as oppressive and vexatious, as the injury itself. Equity gives its remedy by preventing a repetition or continuance of the injury. But this remedy which compels the wrong to cease, is given only where the right is plain, and the redress at law is manifestly inadequate to the ends of justice." *Reid v. Gifford*, *Hopk. Ch.* 416.

7. *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278; *Amsterdam Knitting Co. v. Dean*, 13 App. Div. 42, 43 N. Y. Supp. 29, affirmed, 162 N. Y. 278; *Wright v. Syracuse, etc., R. Co.*, 49 Hun 445, 3 N. Y. Supp. 480, 23 St. Rep. 78, affirmed without opinion, 124 N. Y. 668.

A diversion for the purposes of a municipal water supply is forbidden.⁸ Likewise, it has been held that a riparian proprietor cannot divert some of the water to a private pond and then sell the ice from the pond.⁹ The taking of water from a stream by a railroad for the purpose of supplying its locomotives, may be restrained as an unreasonable diversion.¹⁰

The amount of damages sustained by the complainant may, together with the other circumstances of the case, be considered as to how the court will exercise its discretion. But the diversion of water flowing through premises may be restrained, although the water is of but slight advantage to the proprietor complaining, and an injunction would be of substantial injury to the other party.¹¹ Such relief may be granted, although the plaintiff is not making any artificial use of the water, or any substantial pecuniary profit therefrom, and the defendant is diverting the water for substantial industrial purposes.¹² The fact that only nominal damages are awarded to the plaintiff, does not preclude the granting of injunctive relief, for equity will enjoin an act if the repetition or continuance thereof may become the foundation or evidence of an adverse right although no actual damage is shown.¹³ A lower proprietor may have injunctive relief, although he has as yet made no beneficial use of the water, and there remains in the stream sufficient water for the purposes for which the lower proprietor has been utilizing the stream.¹⁴

Injunctive relief may be denied or postponed in some cases under the familiar rules governing the exercise of equitable power. Thus, if the diversion is committed for the supply of municipal water plant, the interests of the

8. *Parry v. Citizens' Water Works Co.*, 59 Hun 196, 37 St. Rep. 715, 13 N. Y. Supp. 471.

9. *Samuels v. Armstrong*, 46 Misc. 481, 93 N. Y. Supp. 24.

10. *Knauth v. Erie Railroad Co.*, 219 App. Div. 83, 219 N. Y. Supp. 206.

11. *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Amsterdam Knitting Co. v. Dean*, 13 App. Div. 42, 43 N. Y. Supp. 29, affirmed, 162 N. Y. 278; *Smith v. City of Rochester*, 38 Hun 612, affirmed without opinion, 104

N. Y. 674; *Gilzinger v. Saugerties Water Co.*, 66 Hun 173, 49 St. Rep. 308, 21 N. Y. Supp. 121, affirmed on opinion below, 142 N. Y. 633.

12. *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191.

13. *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278.

14. *Gilzinger v. Saugerties Water Co.*, 66 Hun 173, 49 St. Rep. 308, 21 N. Y. Supp. 121, affirmed on opinion below, 142 N. Y. 633.

public require the continuance of the water supply. There being a right of eminent domain for such use, justice is promoted by an award of damages in lieu of injunctive relief, or by postponing the operation of the injunction until an opportunity is had for the maintenance of condemnation proceedings.¹⁵ Or, if the plaintiff has been guilty of laches, injunctive relief may be denied.¹⁶

In the early history of our judicial system, it was held that, if there was any substantial doubt as to the right, equity would not interpose until the right had been settled at law.¹⁷ But, under the present practice as law and equity are administered by the same judicial officers, all issues can be determined in the one action.¹⁸

3. Pollution.

Pollution of water is said to be a form of diversion.¹⁹ A lower proprietor on a stream has a right to a full participation in the use of the water, both as to quantity and quality.²⁰ If a riparian owner contaminates the water so that it becomes offensive to taste or smell, a court of equity may protect a lower owner with injunctive relief.²¹ Relief of

15. *Gallagher v. Kingston Water Co.*, 25 App. Div. 82, 49 N. Y. Supp. 250, affirmed, 164 N. Y. 602; *Rider v. City of Amsterdam*, 31 Misc. 375, 65 N. Y. Supp. 579. See also, *Smith v. City of Rochester*, 92 N. Y. 463.

16. *Penrhyn Slate Co. v. Granville El. L. & P. Co.*, 181 N. Y. 80.

17. *Reid v. Gifford*, 6 Johns. Ch. 19.

18. *Corning v. Troy Iron, etc., Factory*, 40 N. Y. 191.

19. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303.

20. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *New York v. Blum*, 208 N. Y. 237.

21. *Chapman v. Rochester*, 110 N. Y. 273; *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Samons v. City of Gloversville*, 175 N. Y. 346; *New York v. Blum*, 208 N. Y. 237; *Butler v. Village of White Plains*, 59 App. Div. 30, 69 N. Y. Supp. 193; *Sammons v. City of Gloversville*, 81 App. Div. 332, 91 N. Y. Supp. 466; *Warren v. Parkhurst*,

106 App. Div. 239, 93 N. Y. Supp. 1009, affirmed, 186 N. Y. 45; *Gale v. City of Syracuse*, 35 Misc. 465, 71 N. Y. Supp. 986; *Bailey v. City of N. Y.*, 38 Misc. 641, 78 N. Y. Supp. 210; *Weeks-Thorn Paper Co., v. Glenside Woolen Mills*, 64 Misc. 205, 118 N. Y. Supp. 1027; *Western New York Water Co. v. Niagara Falls*, 91 Misc. 73, 154 N. Y. Supp. 1046, affirmed, 176 App. Div. 944, 162 N. Y. Supp. 1149; *Davis v. Lambertson*, 56 Barb. 480; *Seaman v. Lee*, 10 Hun 607; *Beach v. City of Elmira*, 22 Hun 158; *Townsend v. Bell*, 62 Hun 306, 42 St. Rep. 229, 17 N. Y. Supp. 210; *Schrivver v. Village of Johnstown*, 71 Hun 232, 54 St. Rep. 573, 24 N. Y. Supp. 1083, affirmed on opinion below, 148 N. Y. 758. "As water, like air, is an element in which no person can have an absolute property, yet, it is also, like air, free for the use of all, and the law has been diligent and rigorous to maintain it in its natural purity; and any person

this character is justified on the inadequacy of any remedy at law and the prevention of a multiplicity of suits.²²

While equity will not interfere to protect a technical or unsubstantial right,²³ protection will be accorded although the complaining proprietor has sustained no great monetary damage.²⁴ Particularly is this true, if the continuance of the contamination may become the foundation or evidence of an adverse right.²⁵ The fact that the defendant is using the water for important industrial purposes will not neces-

who does any act to it is liable to an action for damages, and may be restrained from doing so by injunction." *Seaman v. Lee*, 10 Hun 607.

Statutory prohibition against contamination.—Where the pollution by the defendants is in violation of express statutory provisions, less evidence of contamination is required to warrant an injunction in favor of one entitled to use the water. *Western New York Water Co. v. Niagara Falls*, 91 Misc. 73, 154 N. Y. Supp. 1046, affirmed, 176 App. Div. 944, 162 N. Y. Supp. 1149.

Duck farm.—"The defendant had the right temporarily to detain or divert the waters of Pine's stream, but the lower riparian owners—and we are considering the plaintiff solely as a riparian owner—had the right to have that water returned in its natural state, save for such slight diminution or pollution as might necessarily occur from a reasonable use. The question in a nutshell is whether it is reasonable for the defendant to divert the water from its natural channel and to return it, laden with the excreta of his domestic animals, when he can with slight trouble prevent such pollution. It is unimportant that those animals happen to be ducks. The plaintiff does not seek to prevent the defendant from raising ducks. It merely asks that he shall conduct that business with some regard to the rights of others. He can allow his ducks to have access to the ponds and

by a little labor prevent the pollution of the waters of the stream." *New York v. Blum*, 208 N. Y. 237.

Pollution from ordinary use.—But it may be said that the watering of cattle in a stream tends to pollute it and even that the flow of water through a mill-wheel might have that effect. But these are trivial and incidental matters, they are practically of no moment and are only indirect effects of a proper use of the stream. Still more, perhaps, the washing of sheep in a stream might pollute it. But that is only an occasional occurrence, necessary and proper in agriculture and temporary in its effect upon the water. It is entirely unlike the acts of the defendants. *Townsend v. Bell*, 62 Hun 306, 42 St. Rep. 229, 17 N. Y. Supp. 210.

22. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Davis v. Lambertson*, 56 Barb. 480; *Townsend v. Bell*, 62 Hun 306, 42 St. Rep. 229, 17 N. Y. Supp. 210.

23. *Warren v. City of Gloversville*, 81 App. Div. 291, 80 N. Y. Supp. 912.

24. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Whalen v. Union Bag & Paper Co.*, 208 N. Y. 1; *Butler v. Village of White Plains*, 59 App. Div. 30, 69 N. Y. Supp. 193; *Warren v. City of Gloversville*, 81 App. Div. 291, 80 N. Y. Supp. 912; *Storm King Paper Co. v. Firth Carpet Co.*, 184 App. Div. 514, 172 N. Y. Supp. 33.

25. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Townsend v. Bell*, 62 Hun 306, 42 St. Rep. 229, 17 N. Y. Supp. 210.

sarily preclude equitable relief.²⁶ The right of the lower owner will not be cut down by the convenience or necessity of the business of an upper owner.²⁷ If the plaintiff has sustained substantial damage from the pollution, the fact that its abatement will cause great loss and injury to the defendant, is no defense, for the defendant has no right to interfere with the plaintiff's right in order to make money for himself.²⁸ It makes but little difference whether the plaintiff acquired his property before or after the pollution commenced; and his motives will not generally be considered.²⁹ The purity of the water may be protected as against sewerage, although the lower owners have as yet suffered no pecuniary damage or injury from disease. The threat of disease is sufficient to justify the relief.³⁰

Equitable relief will not be denied because others are also contaminating the water.³¹ Indeed, such fact may render so difficult the ascertainment of damages, that additional ground for injunctive relief is thereby supplied.³² The fact that others are polluting the water is, however, a partial defense in mitigation of the damages to be awarded to the plaintiff.³³ If the plaintiff is polluting the water, he cannot enjoin others from doing so. He who comes into equity must come with clean hands.³⁴

If the injury is common to two or more lower proprietors, they may join as party plaintiffs.³⁵ Or, if several persons combine in creating the pollution, they may be joined as

26. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Whalen v. Union Bag & Paper Co.*, 208 N. Y. 1.

27. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303.

28. *Whalen v. Union Bag, etc., Co.*, 208 N. Y. 1; *Townsend v. Bell*, 62 Hun 306, 42 St. Rep. 229, 17 N. Y. Supp. 210.

Answer.—The loss anticipated by the defendant is a mitigating circumstance which he may allege as bearing upon the nature of the equitable relief to be granted. *Whalen v. Union Bag & Paper Co.*, 130 App. Div. 313, 114 N. Y. Supp. 220.

29. *Townsend v. Bell*, 62 Hun 306, 42 St. Rep. 229, 17 N. Y. Supp. 210.

30. *Storm King Paper Co. v. Firth*

Carpet Co., 184 App. Div. 514, 172 N. Y. Supp. 33.

31. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Butler v. Village of White Plains*, 59 App. Div. 30, 69 N. Y. Supp. 193; *Townsend v. Bell*, 62 Hun 306, 42 St. Rep. 229, 17 N. Y. Supp. 210.

32. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303.

33. *Whalen v. Union Bag, etc., Co.*, 130 App. Div. 313, 114 N. Y. Supp. 220.

34. *Reese v. City of Johnstown*, 45 Misc. 432, 92 N. Y. Supp. 728.

35. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303.

A board of health may maintain the action. *Board of Health v. Casey*, 18 St. Rep. 251, 3 N. Y. Supp. 399.

party defendants; and, if damages are awarded in addition to injunctive relief, the court may apportion such damages between the defendants.³⁶ A municipality which is contaminating water with garbage or sewerage may be restrained in the same manner as an individual or private corporation.³⁷ But the court may postpone the operation of the injunction as against a municipality, so as to allow it to make other plans for sewerage disposal.³⁸ Postponement of operation may also be allowed in the case of a large industrial establishment.³⁹

4. Dams; flooding.

Equity will restrain the maintenance of an obstruction or dam in a stream, which, without authorization from an upper owner, backs up the waters and floods his lands.⁴⁰

36. *Chipman v. Palmer*, 77 N. Y. 51; *Warren v. Parkhurst*, 105 App. Div. 239, 93 N. Y. Supp. 1009, affirmed, 186 N. Y. 45.

37. *Chapman v. Rochester*, 110 N. Y. 273; *Samons v. City of Gloversville*, 175 N. Y. 346; *Sammons v. City of Gloversville*, 81 App. Div. 332, 81 N. Y. Supp. 466; *Sponenburg v. Gloversville*, 96 App. Div. 157, 89 N. Y. Supp. 19; *Gale v. City of Syracuse*, 35 Misc. 465, 71 N. Y. Supp. 986; *Beach v. City of Elmira*, 22 Hun 158.

38. *Samons v. City of Gloversville*, 175 N. Y. 345; *Sponenburg v. Gloversville*, 96 App. Div. 157, 89 N. Y. Supp. 19; *Lawatsch v. City of Kingston*, 68 Misc. 236, 124 N. Y. Supp. 578.

39. *Weeks-Thorn Paper Co. v. Glenside Woolen Mills*, 64 Misc. 205, 118 N. Y. Supp. 1027.

40. *Clinton v. Myers*, 46 N. Y. 511; *McCormick v. Horan*, 81 N. Y. 86; *Little Falls Fibre Co. v. Ford & Son, Inc.*, 223 App. Div. 559, 229 N. Y. Supp. 445, affirmed, 249 N. Y. 495; *Little Falls Fibre Co. v. Ford & Son, Inc.*, 126 Misc. 126, 212 N. Y. Supp. 630; *Mills v. Hall*, 9 Wend. 315.

A mandatory injunction may be granted to require the lowering of a dam. *Rother v. N. Y. Rubber Co.*,

90 N. Y. 30; *Little Falls Fibre Co. v. Ford & Son, Inc.*, 127 Misc. 834, 217 N. Y. Supp. 534.

Relative rights of parties.—"The true test of the principle and extent of the use, is whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, properly consistent with the existence of the common right. The diminution, retardation or acceleration not positively or sensibly injurious, by diminishing the value of the common right, is an implied element in the right to using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive to common sense nor into extravagant looseness, which would destroy private rights. A water-course begins *ex jure naturae*, and having, taken a certain course naturally, cannot be diverted. '*Aqua currit et debet currere ut currere solebat*' is also the language of the ancient common-law. That is, the water runs naturally and should be permitted thus to run, so

The continuous trespass, the absence of an adequate remedy at law for such irreparable damages, the prevention of a multiplicity of suits, clearly justify equitable intervention.⁴¹ A riparian owner is entitled to have the waters run to, through and past his land to the lower proprietor without substantial interference. It is not necessary for equitable relief that the obstruction extend entirely across the stream; a projection into the stream which has the effect of interfering with the free passage of the water, may be enjoined.⁴² The raising of a dam so as to interfere with the operation of a mill above, may be within the control of a court of equity.⁴³ The owner of a dam is also entitled to equitable relief to restrain a threatened injury thereto.⁴⁴

A lower proprietor cannot complain of the impounding of the waters by an upper proprietor for mill purposes, if the use is reasonable and not in excess of the ordinary flow of the stream.⁴⁵ An unreasonable accumulation of water by

that all, through whose lands it runs may enjoy the privilege of using it." *Clinton v. Myers*, 46 N. Y. 511.

Negligence of public officer.—In an action brought by an owner of lands of Owasco lake, which is a feeder of the Erie canal, to enjoin the superintendent of public works of the state from maintaining flush boards, during the close of navigation of the canal, upon a dam in the outlet of the lake, and to recover damages from him individually, it was found that it was the defendant's official duty at the close of navigation of the Erie canal in each year, to remove the flush boards so as to allow the waters of the lake to flow unobstructed over the dam until the freshets of the next spring should have passed; that the defendant wholly neglected and wrongfully refused to perform his official duty, although often requested by the plaintiff so to do, and that he permitted the flush boards to remain closed upon the dam during the years 1884 to 1888, including the time of the spring freshets and at other times when the waters were running over the flush boards, thereby causing the

waters of the lake to overflow the lands of the plaintiff and inflicting upon him damages to a large amount. Held, that, in view of the findings in the case, sustained by the evidence, the remedy open to plaintiff to seek compensation in the usual way by proceedings in the Board of Claims was manifestly inadequate, and that he was entitled to equitable relief. *Wright v. Shanahan*, 149 N. Y. 495.

41. *Rothery v. N. Y. Rubber Co.*, 90 N. Y. 30.

42. *Gillespie v. Forrest*, 18 Hun 110.

43. *Little Falls Fibre Co. v. Ford & Son, Inc.*, 223 App. Div. 559, 229 N. Y. Supp. 445, affirmed, 249 N. Y. 495; *Hammond v. Fuller*, 1 Paige 197.

44. *Clark v. Mayor, etc., of Syracuse*, 13 Barb. 32.

45. *Henderson Estate Co. v. Carroll Electric Co.*, 113 App. Div. 775, 99 N. Y. Supp. 365, affirmed, 189 N. Y. 531.

Rights of proprietors.—"No proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of a river; the right being common to all the proprietors on the river,

the upper proprietor may, however, be restrained.⁴⁶ The court will not restrain the upper owner from using the water at night and accumulating it by day, when it has been the custom of mill owners on the stream to operate by day or night as convenient.⁴⁷ In times of drought the upper owner may impede the flow sufficiently to create a head of water, although the lower owners are temporarily deprived of the usual flow.⁴⁸ But the upper owner will not be allowed to store the water and then discharge it in such quantities that it overflows the banks of the stream.⁴⁹ And an upper owner who has constructed a dam for the development of a water power, but has not erected any plant and is not making any use of the water at the dam, may be restrained, at the suit of a lower owner operating a mill, from accumulating the water at times and then without notice to the lower owner opening the gates and discharging more than the natural flow of the water.⁵⁰

An injunction, being within certain limits a matter of discretion, is not necessarily granted, although a technical trespass has been committed.⁵¹ If the public interests so demand, equity may define the rights of the parties, and delay the granting of injunctive relief.⁵² Equity will not perpetually enjoin an electric lighting company from maintaining a dam so as to overflow the plaintiff's land, where

no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors, of that which is common to all." *Clinton v. Myers*, 46 N. Y. 511.

46. *Clinton v. Myers*, 46 N. Y. 511.

Excessive use.—An owner has no right to erect machinery, requiring for its operation more water than the stream furnishes at an ordinary stage, and operate such machinery by ponds full, discharging upon those below in unusual quantities, by means of which the latter are unable to use it. *Clinton v. Myers*, 46 N. Y. 511.

47. *Henderson Estate Co. v. Carroll Electric Co.*, 113 App. Div. 775, 99

N. Y. Supp. 365, affirmed, 189 N. Y. 531.

48. *Clinton v. Myers*, 46 N. Y. 511; *Henderson Estate Co. v. Carroll Elec. Co.*, 113 App. Div. 775, 99 N. Y. Supp. 365, affirmed, 189 N. Y. 531.

49. *McKee v. Delaware & Hudson Canal Co.*, 125 N. Y. 353.

50. *Fulton County Gas & Elec. Co. v. Rockwood Mfg. Co.*, 205 App. Div. 787, 200 N. Y. Supp. 225, modified, 238 N. Y. 109.

51. *McCann v. Chasm Power Co.*, 151 App. Div. 304, 136 N. Y. Supp. 383, affirmed, 211 N. Y. 301; *Thompson v. Ft. Miller Pulp, etc., Co.*, 195 App. Div. 271, 186 N. Y. Supp. 817; *Dailey v. Northern New York Utilities, Inc.*, 129 Misc. 182, 221 N. Y. Supp. 52.

52. *McCann v. Chasm Power Co.*, 151 App. Div. 304, 136 N. Y. Supp. 383,

it is the only company furnishing light to a municipality, and the damages to the plaintiff are small and recoverable at law.⁵³ If the impounding of the waters by the upper proprietor does no substantial damage to the lower owner and an injunction would operate harshly on the upper owner, injunctive relief may be denied.⁵⁴

Several proprietors similarly injured by flooding, may join as plaintiffs in one action.⁵⁵ The fact that the obstruction constitutes a public nuisance does not preclude one who is specially injured thereby from maintaining suit.⁵⁶

5. Artificial drainage of surface waters.

The owner of property or a municipality may turn surface drainage into a natural watercourse flowing through the lands of private owners, so long as the watercourse is not overtaxed.⁵⁷ But the flow of a stream cannot be increased if a riparian owner is thereby prejudiced.⁵⁸ One cannot collect surface waters and discharge them on an adjoining owner.⁵⁹

affirmed, 211 N. Y. 301; *Thompson v. Ft. Miller Pulp & Paper Co.*, 111 Misc. 477, 181 N. Y. Supp. 714, modified on other grounds, 195 App. Div. 271, 186 N. Y. Supp. 817.

53. *Schwarzenbach v. Oneonta Light, etc., Co.*, 144 App. Div. 884, 129 N. Y. Supp. 384, modified on other grounds, 207 N. Y. 671.

54. *McCann v. Chasm Power Co.*, 211 N. Y. 301; *Loukes v. Payne*, 140 App. Div. 776, 125 N. Y. Supp. 850.

55. *Gillespie v. Forrest*, 18 Hun 110.

56. *Gillespie v. Forrest*, 18 Hun 110.

57. *McCormick v. Horan*, 81 N. Y. 86; *Penfield v. City of New York*, 115 App. Div. 502, 101 N. Y. Supp. 442.

Rights of parties.—"The right of an owner of lands, through which a watercourse runs to have the same kept open, and to discharge therein the surface water, which naturally flows thereto, is not however limited to the drainage and discharge of surface water into the stream in the same precise manner as when the land was

in a state of nature, and unchanged by cultivation or improvements. The owner of lands drained by a watercourse, may change and control the natural flow of the surface water therein, and by ditches or otherwise accelerate the flow, or increase the volume of water which reaches the stream, and if he does this in the reasonable use of his own premises, he exercises only a legal right, and incurs no liability to a lower proprietor. * * * This right is subject to the qualification that one owner cannot, by artificial arrangements on his land, concentrate and discharge into the stream surface water in quantities beyond the natural capacity of the stream to the damage of other owners." *McCormick v. Horan*, 81 N. Y. 86.

58. *Patterson v. More*, 14 Week. Dig. 561.

59. *Lamay v. City of Fulton*, 48 Misc. 153, 96 N. Y. Supp. 701.

6. Obstruction to navigation.

A material obstruction to navigation is a public nuisance.⁶⁰ Law and equity have concurrent jurisdiction in the abatement of nuisances. The public authorities may maintain an action to abate such an obstruction in the navigable waters of the State; or an individual who is specially damaged thereby may secure relief on his own initiative.⁶¹ A threatened obstruction may be prevented by injunction;⁶² an

60. *Hudson River Co. v. Loeb*, 30 Super. Ct. (7 Rob.) 418.

61. *New York Dock Co. v. Flinn-O'Rourke Co., Inc.*, 234 N. Y. 127; *Appleby v. New York*, 199 App. Div. 539, 192 N. Y. Supp. 211, affirmed, 235 N. Y. 351; *Dimon v. Shewan*, 34 Misc. 72, 69 N. Y. Supp. 402; *White Gratwick & Mitchell, Inc., v. Empire Eng. Co.*, 125 Misc. 47, 210 N. Y. Supp. 563, affirmed, 211 App. Div. 834, 206 N. Y. Supp. 973, affirmed, 240 N. Y. 648; *People v. Vanderbilt*, 38 Barb. 282, 24 How. Pr. 301, affirmed, 26 N. Y. 287, 28 N. Y. 396; *Hudson River Co. v. Loeb*, 30 Super. Ct. (7 Rob.) 418.

Floating elevator.—Where the mere presence in a ship canal of a floating elevator is not of itself an obstruction to navigation, but it only becomes such when used in a particular manner, a court of equity will not direct the removal of the elevator, but simply forbid its use in such unlawful manner. *People v. Horton*, 5 Hun 516, affirmed, 64 N. Y. 610.

Floating dry-dock.—The owners of a bulkhead on the East river front of the city of New York between East Third and Fourth streets of the land under it and of the upland, and who have the right to exact wharfage, crantage, etc., are entitled, pending the trial of their action for a nuisance, to restrain the dock commissioners of said city from permitting proposed lessees of the city to construct, on the southerly side of the pier at East Fourth street, a floating dry dock 237 feet long and 81 feet wide, a construc-

tion which apparently would seriously impair the plaintiff's use of their bulkhead and constitute a nuisance as to them. *Dimon v. Shewan*, 34 Misc. 72, 69 N. Y. Supp. 402.

Overlapping on canal.—In an action brought by the owners of the Swift Sure elevator against the owners of the Ontario elevator to restrain the latter from allowing vessels moored in front of their premises to overlap the plaintiff's premises and to recover the reasonable tolls, dockage and wharfage for the past use of such docks. **Held**, that a judgment dismissing the complaint should be affirmed. That the plaintiff was not entitled to injunctive relief against the long-continued privilege of overlapping, as such relief would necessarily deprive the defendants of the use of their elevator and of the right secured to them by the contract made in 1834 of free ingress and egress in and to every part of the canal for the transaction of business or commerce; that the damages sustained by the plaintiffs were not substantial enough to give them an absolute right to have the court retain the case in order to assess such damages. *Morse v. Wheeler*, 68 App. Div. 428, 73 N. Y. Supp. 930, affirmed on opinion below, 175 N. Y. 502.

62. *White, Gratwick & Mitchell, Inc. v. Empire Eng. Co.*, 125 Misc. 47, 210 N. Y. Supp. 563, affirmed, 211 App. Div. 834, 206 N. Y. Supp. 973, affirmed, 240 N. Y. 648; *People v. Vanderbilt*, 38 Barb. 282, 24 How. Pr. 301, affirmed, 26 N. Y. 287, 28 N. Y. 396.

existing obstruction may be removed by mandatory injunction.⁶³ The person maintaining the nuisance cannot secure an injunction to restrain interference with the obstruction.⁶⁴

In the interests of commerce, docks and conveniences of similar nature are necessary. These may partially interfere with the free use of the water by others; but, if they are authorized, they do not constitute a nuisance.⁶⁵ An obstruction erected for the benefit of commerce is not a nuisance, although it is an obstruction, unless it materially impairs the right of navigation.⁶⁶

7. Subterranean waters; springs.

Ordinarily one may dig as he pleases on his own lands although it interferes with a vein of water which supplies his neighbor. He cannot, however, install powerful pumps so as to draw all the water from beneath the soil of other nearby proprietors.⁶⁷ The unauthorized taking of water from or interference with a spring may be enjoined.⁶⁸

8. Lakes and ponds.

Conflicting claims as to the right to use the shore or the waters of a lake or pond for boating, fishing, bathing, ice-

63. *Appleby v. New York*, 199 App. Div. 539, 192 N. Y. Supp. 211, affirmed, 235 N. Y. 351.

64. *Moore v. Board of Commissioners of Pilots*, 32 How. Pr. 184.

65. *Delaware & Hudson Canal Co. v. Laurence*, 2 Hun 163, affirmed on opinion below, 56 N. Y. 612.

66. *Delaware & Hudson Canal Co. v. Laurence*, 2 Hun 163, affirmed on opinion below, 56 N. Y. 612.

67. *People v. N. Y. Carbonic Acid Gas Co.*, 196 N. Y. 421; *Baumann v. City of New York*, 227 N. Y. 225. See also, *Jager v. City of New York*, 75 App. Div. 258, 78 N. Y. Supp. 49.

Saratoga Springs.—See *People v. N. Y. Carbonic Acid Gas Co.*, 196 N. Y. 421; *Saratoga State Waters Corp. v. Pratt*, 227 N. Y. 429.

68. *Hutchins v. Lavery*, 78 Misc. 518, 139 N. Y. Supp. 957; *Eberts v. Peters*, 167 App. Div. 468, 152 N. Y. Supp. 1091.

Pollution of spring by school district.

—In an action by a property owner to restrain a school district from using cesspools and for damages arising out of the alleged contamination of a spring on plaintiffs' premises in which it appeared that the cesspools were located about 500 feet from the spring and on the opposite side of the highway, the plaintiffs will not be granted an injunction, since it appears that as soon as the school district was notified by the plaintiffs that the cesspools were contaminating their spring, the district ceased using the cesspools. The school district will not be held liable in damages, since it appears that it was not negligent in placing the cesspools or in using them, and that it had no knowledge whatever that there was an underground stream through which the contamination might be carried from the cesspools to the plaintiff's spring. *Thompson v. Board of Education*, 124 Misc. 840, 209 N. Y. Supp. 362.

cutting, or industrial uses, are frequently determined in an action of injunction.⁶⁹ The ownership of a part of the bed of a lake does not give such owner a general right to use the entire lake.⁷⁰ The pollution of the water to the damage of the proprietors, may be restrained.⁷¹ And the owner of a pond may, in a proper case, be restrained from permitting the waters thereof to become stagnant and noxious, thus creating a public nuisance.⁷² An unauthorized act which will drain a pond or seriously affect the water level, may be restrained.⁷³ A grant to a water company of the right to take water therefrom for domestic consumption, may bar the grantor from using the water for bathing and fishing, and injunction is a proper remedy to restrain such acts.⁷⁴

9. Ice.

In the absence of a grant affecting the rights of the parties, the owner of the soil is entitled to take ice from the water on his lands; and this right, in a proper case may be protected by injunction.⁷⁵ In some cases the remedy at law

69. *Commonwealth Water Co. v. Brunner*, 175 App. Div. 153, 161 N. Y. Supp. 794; *Lloyd v. Thompson*, 60 N. Y. Supp. 72; *Belknap v. Trimble*, 3 Paige 577.

70. *Commonwealth Water Co. v. Brunner*, 175 App. Div. 153, 161 N. Y. Supp. 794.

71. *Gale v. City of Syracuse*, 35 Misc. 465, 71 N. Y. Supp. 986.

72. *Yonkers Bd. of Health v. Coppcutt*, 140 N. Y. 12.

73. *Ambrose v. Buffalo*, 46 St. Rep. 937, 20 N. Y. Supp. 129.

Artificial pond.—A plaintiff has no cause of action to restrain the defendant from lowering the water in a pond on the shores of which the plaintiff has a steam saw mill, where it appears that the pond in question was created more than fifty years ago by the predecessors in title of the defendant, by the erection of a dam across a creek, and that the defendant acquired all the rights that its predecessors in title had to use the dam

and the power created by the water flowing from the pond. The plaintiff has no riparian rights in the pond in question, since it is an artificial body of water in reference to which riparian rights do not exist, and, therefore, the defendant has the right to lower the level of the pond at will or to destroy the pond if it sees fit, without rendering itself liable to the plaintiff. *Caflisch v. Clymer Power Corp.*, 125 Misc. 243, 211 N. Y. Supp. 338.

74. *Commonwealth Water Co. v. Brunner*, 175 App. Div. 153, 161 N. Y. Supp. 794.

75. *Hinckel v. Stevens*, 17 App. Div. 279, 45 N. Y. Supp. 678; *Commonwealth Water Co. v. Brunner*, 175 App. Div. 153, 161 N. Y. Supp. 794; *Marshall v. Peters*, 12 How. Pr. 218.

Cutting ice as diversion.—It has been held that it is an unlawful diversion for an upper riparian owner to lead the water of a stream into a private pond, and sell from the pond the ice formed thereon. *Samuels v. Arm-*

for damages may be sufficient relief,⁷⁶ but, if the hostile right is asserted with a show of force, and continuous trespasses and a multiplicity of actions are threatened, the situation justifies the intervention of equity.⁷⁷ The situation may be different when the right to take ice from navigable waters is involved. Thus, the right to take ice from the Hudson River is given by statute, and as the statute provides the remedy for trespasses, the statutory remedy is ordinarily exclusive.⁷⁸

10. Oyster beds.

A court of equity may protect the owner of an oyster bed from trespassers, if it appears that there is no adequate remedy at law.⁷⁹ A person having the exclusive right to plant oysters in certain waters may restrain others from doing so.⁸⁰ The pollution of the water to an extent that an oyster bed may be injured, may be prevented by injunction.⁸¹ On the other hand, an oyster company in the course of its operations cannot obstruct the right of ingress and egress which riparian owners may have; and an injunction is a proper remedy to remove such an interference.⁸²

Equity will not enjoin one of two tenants in common of natural oyster beds, or his licenses, from entering and removing natural oysters therefrom, on the ground that such acts interfere with seed oysters, planted by his co-tenant without his acquiescence, where it does not appear that the

strong, 46 Misc. 481, 93 N. Y. Supp. 24.

The pollution of the water, thereby injuring the quality of the ice, may be enjoined. *Finger v. City of Kingston*, 29 St. Rep. 702, 9 N. Y. Supp. 175.

76. *Briggs v. Knickerbocker Ice Co.*, 11 Misc. 197, 65 St. Rep. 152, 32 N. Y. Supp. 95.

77. *Hinckel v. Stevens*, 17 App. Div. 279, 45 N. Y. Supp. 678; *Green Island Ice Co. v. Norton*, 42 Misc. 238, 86 N. Y. Supp. 613, affirmed, 105 App. Div. 331, 94 N. Y. Supp. 1147, affirmed, 189 N. Y. 529.

78. *Briggs v. Knickerbocker Ice Co.*, 11 Misc. 197, 65 St. Rep. 152, 32 N. Y. Supp. 95.

79. "Where the acts interfere with

rights and privileges over natural objects, like standing timber, water rights, and other similar interests not ordinarily marketable, the injured party is entitled to an injunction, even if the aggressor is of ample financial responsibility. This precise principle has been applied to the protection of oyster beds, both natural and artificial, and injunctions granted to restrain depredations thereon." *Smithtown v. St. James Oyster Co.*, 80 Misc. 173, 140 N. Y. Supp. 981.

80. *Smithtown v. St. James Oyster Co.*, 80 Misc. 173, 140 N. Y. Supp. 981.

81. *Bailey v. City of N. Y.*, 38 Misc. 641, 78 N. Y. Supp. 210.

82. *Hard v. Blue Points Co.*, 170 App. Div. 524, 156 N. Y. Supp. 465.

acts done in removing the oysters were malicious, unusual or unreasonable, and it does appear that an injunction, if granted, would operate inequitably and contrary to real justice, by working a deprivation of admitted rights.⁸³

K. Protection from illegal tax.

1. In general.

It is a broad general rule that the courts will not interfere by injunction to restrain the assessment or the collection of a tax.⁸⁴ The rule is based on public policy, in recognition of the fact that public moneys are necessary for the maintenance of governmental functions, and the individual should not be permitted to thwart their collection.⁸⁵

83. *Mott v. Underwood*, 148 N. Y. 463.

84. *Susquehanna Bank v. Supervisors of Broome*, 25 N. Y. 312; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Delaware and Hudson Canal Co. v. Atkins*, 121 N. Y. 246; *Balogh v. Lyman*, 6 App. Div. 271, 39 N. Y. Supp. 780; *Mutual Benefit Life Assn. Co. v. Supervisors of N. Y.*, 3 Abb. Ct. App. Dec. 344, 2 Abb. Pr. N. S. 233, 32 How. Pr. 359; *Thurston v. City of Elmira*, 10 Abb. Pr. N. S. 119; *Van Rensselaer v. Kidd*, 4 Barb. 17; *Blake v. Brooklyn*, 26 Barb. 301; *Messeck v. Columbia County*, 50 Barb. 190; *Wilson v. Mayor, etc., of N. Y.*, 4 E. D. Smith 675, 1 Abb. Pr. 4; *Pumpelly v. Village of Owego*, 45 How. Pr. 219; *Mann v. Board of Education*, 53 How. Pr. 289; *Rome, Watertown, etc., R. Co., v. Smith*, 39 Hun 332; *Mooers v. Smedley*, 6 Johns. Ch. 28; *Patterson v. Mayor of N. Y.*, 1 Paige 114; *Postal Tel. Co. v. Grant*, 33 St. Rep. 997, 11 N. Y. Supp. 323, appeal dismissed, 128 N. Y. 633; *N. Y. Life Ins. Co. v. Supervisors of N. Y.*, 11 Super. Ct. (4 Duer) 192, 1 Abb. Pr. 250.

"To enable the plaintiff to maintain this action and enjoin the collection of the tax, he must bring his case within some one of the acknowledged heads of equity jurisdiction,

which are held to be as follows. (*Jeywood v. City of Buffalo*, 14 N. Y. Rep. [4 Kern.] 541.) 1st. Where the proceedings of the subordinate tribunal will necessarily lead to a multiplicity of actions. 2d. Where they lead, in their execution, to the commission of irreparable injury to the freehold. 3d. Where the claim of the adverse party to the land bought at the tax sale is valid upon the face of the instrument, or the proceedings sought to be set aside, and extrinsic facts are necessary to be proven to establish invalidity or illegality. Also where the tax is upon land, and the law allows it to be sold to collect the tax, and the conveyance to be executed by the proper officer would be conclusive evidence of title. (*Susquehanna Bank v. Supervisors of Broome*, 25 N. Y. Rep. 314) and in *Milbau v. Sharp*, (27 id. 611) the plaintiff's right to an injunction restraining a railway in Broadway was upheld upon the ground of special injury." *Hanlon v. Supervisors of Westchester*, 8 Abb. Pr. N. S. 261, 57 Barb. 383.

85. *Western R. Co. v. Nolan*, 48 N. Y. 513; *Balogh v. Lyman*, 6 App. Div. 271, 39 N. Y. Supp. 780; *Messeck v. Columbia County*, 50 Barb. 190; *Rome, Watertown, etc., R. Co., v. Smith*, 39 Hun 332.

2. Illegal assessment.

The remedy for the illegal assessment of a tax is by a writ of certiorari under section 290 of the Tax Law.⁸⁶ So far as this remedy is applicable it is exclusive.⁸⁷ Hence equity will not restrain the collection of a tax on the ground that the assessment was irregular or illegal.⁸⁸ But where the proceedings are without jurisdiction or are absolutely void for some other reason, equity will in some cases intervene.⁸⁹

3. Execution of illegal tax deeds.

In some cases upon a showing of illegality in the proceedings, equity has assumed the power to cancel a tax deed;⁹⁰ or, if the proceedings have not reached the stage for the delivery of a deed, to restrain the sale or the execution of a deed.⁹¹ Equitable jurisdiction is justified on the ground that it prevents the creation of a cloud upon title.⁹²

86. See *Fiero on Particular Actions and Proceedings*, vol. 4, page 3381.

87. *Mercantile Nat. Bank v. Mayor*, etc., of N. Y., 172 N. Y. 56; *People ex rel. Railroad v. Block*, 178 App. Div. 251, 164 N. Y. Supp. 962.

88. *Western R. Co. v. Nolan*, 48 N. Y. 513; *Delaware & Hudson Canal Co. v. Atkins*, 121 N. Y. 246; *Balogh v. Lyman*, 6 App. Div. 271, 39 N. Y. Supp. 780; *Mutual Benefit Life Assn. Co. v. Supervisors of N. Y.*, 3 Abb. Ct. App. Dec. 344, 2 Abb. Pr. N. S. 233, 32 How. Pr. 359; *Wilson v. Mayor*, etc., of N. Y., 4 E. D. Smith 675, 1 Abb. Pr. 4; *Pacific Mail Steamship Co. v. Mayor*, etc., of N. Y., 57 How. Pr. 511; *Nichols v. Voorhis*, 18 Hun 33; *Delaware & Hudson Canal Co. v. Atkins*, 48 Hun 456, 16 St. Rep. 332, 1 N. Y. Supp. 80, affirmed, 121 N. Y. 246; *Postal Tel. Co. v. Grant*, 33 St. Rep. 997, 11 N. Y. Supp. 323, appeal dismissed, 128 N. Y. 633; *Astor v. Mayor*, etc., of N. Y., 39 Super. Ct. (7 J. & S.) 120, affirmed, 62 N. Y. 580.

89. *N. Y. Infant Asylum v. Supervisors of Westchester*, 31 Hun 116.

90. See the Chapter on Rescission.

91. *Kind v. Townsend*, 141 N. Y. 358; *Scott v. Onderdonk*, 14 N. Y. 9; *Providence Retreat v. City of Buffalo*, 29 App. Div. 160, 51 N. Y. Supp. 654; *Matthews v. Mayor*, etc., of N. Y., 14 Abb. Pr. 209; *Mann v. City of Utica*, 44 How. Pr. 334; *Sixth Ave. R. Co. v. Mayor*, etc., of N. Y., 63 Hun 271, 43 St. Rep. 759, 17 N. Y. Supp. 903.

92. *Kind v. Townsend*, 141 N. Y. 358; *Sixth Ave. R. Co. v. Mayor*, etc., of N. Y., 63 Hun 271, 43 St. Rep. 759, 17 N. Y. Supp. 903.

Sale of personal property.—Equity will not intervene to restrain a sale of personal property levied upon by a tax collector, as there exists an adequate remedy at law. *Von Beck v. Village of Rondout*, 15 Abb. Pr. 48; *Nichols v. Voorhis*, 18 Hun 33.

A certificate issued by the State Comptroller upon a sale of lands for taxes, does not create a cloud on title. The Comptroller can cancel the sale if he discovers that the sale was invalid, and therefore an injunction will not issue to restrain the delivery of a tax deed by him. *Clark v. Davenport*, 95 N. Y. 477. Nor will the

If the tax proceedings are void upon their face, there is no necessity for the intervention of equity, for the owner may assert the invalidity of the proceedings when his title is questioned.⁹³ The same rule applies when the proceedings are not necessarily void on their face, but the adverse claimant must show their regularity, or the irregularity would necessarily appear, in a proceeding to assert a claim arising out of the tax sale.⁹⁴ The equitable relief is granted only when the tax deed will be conclusive or *prima facie* evidence of title.⁹⁵

4. Local assessments.

In some cases, courts of equity have restrained the enforcement of special assessments made for local improvements.⁹⁶ Such relief may be granted where it is necessary to prevent a multiplicity of suits, or irreparable damage, or where the assessment, on the face of the proceedings to impose it, is a valid lien on land, and extrinsic evidence is necessary to show its invalidity.⁹⁷ The relief is granted to avoid a cloud on the owner's title to his estate. In many cases, however, the remedies which the owner may have at law, or by certiorari proceedings, or by resistance to the

Comptroller be restrained from granting an application to vacate the cancellation of a certificate. *Weed v. Roberts*, 22 Misc. 46, 49 N. Y. Supp. 366.

93. *Scott v. Onderdonk*, 14 N. Y. 9; *Heywood v. Buffalo*, 14 N. Y. 534; *United Lines Tel. Co. v. Grant*, 137 N. Y. 7; *Schulz v. Albany*, 27 Misc. 51, 57 N. Y. Supp. 963, affirmed, 42 App. Div. 437, 59 N. Y. Supp. 235; *Howell v. City of Buffalo*, 2 Abb. Ct. App. Dec. 412; *Crevier v. Mayor, etc., of New York*, 12 Abb. Pr. N. S. 340; *Von Beck v. Village of Rondout*, 15 Abb. Pr. 48, affirmed, 41 N. Y. 619; *Van Rensselaer v. Kidd*, 4 Barb. 17; *Magee v. Cutler*, 43 Barb. 239; *Sixth Ave. R. Co. v. Mayor, etc., of N. Y.*, 63 Hun 271, 43 St. Rep. 759, 17 N. Y. Supp. 903; *Scudder v. Mayor, etc., of N. Y.*, 60 St. Rep. 858, 29 N. Y. Supp. 422, affirmed, 146 N. Y. 245.

94. *Allen v. City of Buffalo*, 39 N.

Y. 386; *Marsh v. Brooklyn*, 59 N. Y. 280; *Tilden v. Mayor, etc., of N. Y.*, 56 Barb. 340.

95. *Scott v. Onderdonk*, 14 N. Y. 9; *Susquehanna Bank v. Supervisors of Broome*, 25 N. Y. 312; *Sanders v. Village of Yonkers*, 63 N. Y. 489.

96. *Kennedy v. Troy*, 14 Hun 308, reversed on other grounds, 77 N. Y. 493; *Copeutt v. City of Yonkers*, 83 Hun 178, 64 St. Rep. 286, 31 N. Y. Supp. 659; *Longley v. City of Hudson*, 4 T. & C. 353.

97. *Scott v. Onderdonk*, 14 N. Y. 9; *Heywood v. City of Buffalo*, 14 N. Y. 534; *Thurston v. City of Elmira*, 10 Abb. Pr. N. S. 119; *Crevier v. Mayor, etc., of New York*, 12 Abb. Pr. N. S. 340; *Copeutt v. City of Yonkers*, 83 Hun 178, 64 St. Rep. 286, 31 N. Y. Supp. 659; *Mann v. City of Utica*, 44 How. Pr. 334; *Longley v. City of Hudson*, 4 T. & C. 353.

proceedings of the municipality, are deemed adequate, and hence equitable relief may be denied.⁹⁸ If the proceedings are void upon their face, there is no cloud on title, and hence the reason for equitable interference does not apply.⁹⁹ Or, if the party claiming under the proceedings is bound to show the facts and the defect will then necessarily appear, there is no ground for the exercise of the equitable powers of the court.¹ Relief is granted when the tax deed is conclusive or *prima facie* proof of the regularity of the proceedings.² Provisions in the charters of some cities forbid a remedy by injunction.³

L. Equity of redemption.

1. Statutory foreclosure of real estate mortgage.

Proceedings for the foreclosure of a mortgage by advertisement under section 540-561 of the Real Property Law afford no opportunity for the mortgagor to present any defense. The proceedings might create a cloud on his title and cause him irreparable damage for which there is no adequate remedy at law. If the mortgagor has a defense to the foreclosure of the mortgage, he can restrain a sale under the statutory provisions.⁴ It has been held that the

98. United Lines Tel. Co. v. Grant, 137 N. Y. 7; Thurston v. City of Elmira, 10 Abb. Pr. N. S. 119; Crevier v. Mayor, etc., of N. Y., 12 Abb. Pr. N. S., 340; Blake v. City of Brooklyn, 26 Barb. 301; Mace v. Trustees of Newburgh, 15 How. Pr. 161; LeRoy v. Mayor, etc., of N. Y., 4 Johns. Ch. 352; Whitney v. Mayor, etc., of N. Y., 1 Paige 548; Champlin v. New York, 3 Paige 573.

99. Scott v. Onderdonk, 14 N. Y. 9; Heywood v. Buffalo, 14 N. Y. 534; United Lines Tel. Co. v. Grant, 137 N. Y. 7; Crevier v. Mayor, etc., of New York, 12 Abb. Pr. N. S. 340.

1. Scott v. Onderdonk, 14 N. Y. 9; Crevier v. Mayor, etc., of New York, 12 Abb. Pr. N. S. 340.

2. Scott v. Onderdonk, 14 N. Y. 9.

3. Lennon v. Mayor, etc., of N. Y., 55 N. Y. 361; Mayer v. Mayor, etc., of City of N. Y., 101 N. Y. 284; People

ex rel. Martin v. Myers, 135 N. Y. 465; Scudder v. Mayor, etc., of N. Y., 146 N. Y. 245; Sixth Ave. R. Co. v. Mayor, etc., of N. Y., 63 Hun 271, 43 St. Rep. 759, 17 N. Y. Supp. 903; Matter of Bridgford, 65 Hun 227, 20 N. Y. Supp. 287, 47 St. Rep. 676; Rae v. Mayor, etc., of N. Y., 39 Super. Ct. (7 J. & S.) 192, appeal dismissed, 62 N. Y. 631; Astor v. Mayor, etc., of N. Y. 39 Super. Ct. (7 J. & S.) 120, affirmed, 62 N. Y. 580.

4. See, Tillou v. Sharpsteen, 5 Johns. Ch. 260.

Costs.—Where the mortgagee was proceeding, upon a statute foreclosure, to sell the mortgaged premises for a much larger sum than was actually due on the mortgage, and the mortgagor filed a bill in chancery to restrain such sale, without having tendered or offered to pay what was legally and equitably due, the court re-

remedy is not available when the sole defense is the running of the Statute of Limitations, and the mortgagor does not allege a payment of the mortgage,⁵ but subdivision 4 of section 540 seems to effect a change in this equitable principle.

2. Chattel mortgage.

A chattel mortgagee is not required to institute legal proceedings for the foreclosure of his claim. He may seize the property and sell the chattels. If he wrongfully proceeds on such course of action, injunction may be a proper remedy.⁶ Equitable relief is thought necessary on account of the absence of any adequate remedy at law.⁷ Equity

fused to allow costs to either party as against the other. *Vechte v. Brownell*, 8 Paige 212.

Land in another state.—A court of equity of this state has no authority to enjoin a mortgagee of lands, situate without the state, from selling the mortgaged lands by public sale within this state, according to the terms of the mortgage, upon the mere allegation that such power is void, where no statute of the state or territory where the lands are situated, nor any other invalidity in the power, is stated or made apparent. *Central Gold Mining Co. v. Platt*, 3 Daly 263.

A junior mortgagee cannot enjoin the statutory foreclosure of an earlier mortgage, in the absence of some defense to the mortgage. *Bedell v. McLellan*, 11 How. Pr. 172.

5. *House v. Carr*, 185 N. Y. 453.

6. *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037; *Glover v. Silverman*, 6 Misc. 347, 58 St. Rep. 137, 26 N. Y. Supp. 779; *Ford v. Ransom*, 8 Abb. Pr. N. S. 416, 39 How. Pr. 429; *Bennett v. Wright*, 77 Hun 331, 28 N. Y. Supp. 453. See also, *Castoriano v. Dupe*, 145 N. Y. 250.

Action for rescission.—Where a mortgagee has the right under a power of sale contained in a chattel mortgage to foreclose the same without action, the validity thereof can be con-

tested only by an action to have it adjudged that it is null and void or that it has been paid, in which action the mortgagee may properly ask for the foreclosure of his mortgage. Pending the determination of such action the mortgagee may be properly restrained from enforcing the power of sale contained in the mortgage. *Bennett v. Wright*, 77 Hun 331, 28 N. Y. Supp. 453.

Action by junior mortgagee.—Where the amount due upon a senior chattel mortgage is in dispute, the owner thereof claiming that it covers future advances, a tender by a junior mortgagee of the amount due thereon at the time of its execution although not kept good by payment into court, is at least effective to give the junior mortgagee a footing in equity to sue to compel the senior mortgagee to assign or cancel the mortgage upon payment of the debt and, upon a complaint seeking such relief and bringing the money tendered into court and an affidavit offering present payment of that sum and security for the balance in dispute, to enjoin the senior mortgagee from foreclosing. *Bernheimer, etc., v. Brewing Co. v. Koehler Co.*, 42 Misc. 377, 86 N. Y. Supp. 716.

7. *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037.

finds additional ground for relief, if the mortgagee's procedure is such as might lead to a multiplicity of suits.⁸ If, however, the remedy at law is thought adequate, equitable relief will be denied.⁹

If the mortgagor is not in default, or if the mortgage is for any reason void, or if it has been paid, or is unenforceable for some other reason, a threatened foreclosure may be enjoined.¹⁰ Or, if the mortgagee is threatening to take the property under the "danger clause" when in fact he has no reason to deem himself unsafe, injunction may be an appropriate remedy. So, too, if the mortgage is invalid for failure to file or refile the instrument, one who is in a position to take advantage of the failure, and who has possession of the goods, may have his possession protected by injunction.¹¹ Moreover, an injunction will lie in some cases to restrain an action in an inferior court for the foreclosure of the mortgage.¹²

8. *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037.

9. *Weber v. Freifeld*, 204 App. Div. 413, 198 N. Y. Supp. 122; *Warner v. Paine*, 3 Barb. Ch. 630; *Bayaud v. Fellows*, 28 Barb. 451.

10. *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037; *Kaufman v. Schwartz*, 174 App. Div. 239, 160 N. Y. Supp. 1056; *Glover v. Silverman*, 6 Misc. 347, 58 St. Rep. 137, 26 N. Y. Supp. 779; *Ford v. Ransom*, 8 Abb. Pr. N. S. 416, 39 How. Pr. 429; *Ehrgott v. Forgotston*, 43 St. Rep. 60, 17 N. Y. Supp. 381.

Usury.—Allegations of usury in the note which a chattel mortgage was given to secure are sufficient to sustain an action to declare such note and mortgage void and canceled, and for an injunction to restrain interference with the mortgaged property. A complaint setting forth facts showing usury in the note for which a chattel mortgage was given, supported by affidavits which also show that the defendants have levied upon a portion of the goods under alleged foreclosure proceedings, refuse to allow plaintiff

to see them and threaten to take and dispose of the other goods in plaintiff's possession, is sufficient to justify a conclusion that plaintiff has no adequate remedy at law. *Glover v. Silverman*, 6 Misc. 347, 58 St. Rep. 137, 26 N. Y. Supp. 779.

11. *Beebe v. Prime*, 99 Misc. 668, 166 N. Y. Supp. 56.

Administratrix.—A copy of a chattel mortgage given in 1914 was seasonably filed in the proper clerk's office, and the mortgage was refiled in 1915, but not in 1916. Held, that though the mortgage was invalid against the creditors of the mortgagor, his administratrix, who was in possession of the mortgaged chattels, some of which were included in the inventory of the estate filed in the Surrogate's Court, will be granted an injunction *pendente lite* in an action to permanently enjoin the enforcement of the mortgage. *Beebe v. Prime*, 99 Misc. 668, 166 N. Y. Supp. 56.

12. *Kaufman v. Schwartz*, 174 App. Div. 239, 160 N. Y. Supp. 1056. See also, *Kelly v. Ruppert*, 173 App. Div. 116, 159 N. Y. Supp. 366.

3. Pledge.

Ordinarily the pledgee of securities will not be restrained from enforcing the pledge by a sale of the property.¹³ The remedy of the pledgor in an action for damages is usually adequate.¹⁴ This is particularly true when the pledgee is financially able, and the securities have a ready market and hence easily replaceable.¹⁵ If the pledgee has a right to sell the securities, the fact that the time is not favorable for a sale, furnishes no ground for injunctive relief.¹⁶ If the pledgee repledges them, the true owner may have a remedy in replevin which will preclude an action in equity.¹⁷

M. Municipal permits and licenses.

The right to a municipal license or permit is usually tested in a mandamus proceeding to compel the issuance of the license or permit.¹⁸ If the right has actually been granted, but the municipality or officers or board thereof threatens to revoke it, in some cases, the controversy may be determined by a court of equity in an action of injunction.¹⁹ If, however, the city charter provides some other remedy for the review of the acts of its officers, equity may decline to act before resort has been made to such remedy.²⁰

A license, upon the faith of which the licensee has acted and made substantial expenditures, cannot generally be arbitrarily revoked.²¹ Thus, after one has received a permit to move a building through city streets, and has expended money and made a contract for the moving, the license

13. *Ehrich v. Grant*, 111 App. Div. 196, 97 N. Y. Supp. 600.

14. *Ehrich v. Grant*, 111 App. Div. 196, 97 N. Y. Supp. 600; *Fleitmann v. Union Bank*, 93 Misc. 595, 158 N. Y. Supp. 439; *MacFarland v. Liberty Nat. Bank*, 166 N. Y. Supp. 393; *Park v. Musgrave*, 2 T. & C. 571.

15. *Ehrich v. Grant*, 111 App. Div. 196, 97 N. Y. Supp. 600.

16. *Greene v. Faber*, 158 App. Div. 149, 143 N. Y. Supp. 27.

17. *Syracuse Rapid Transit R. Co., v. Salt Springs Nat. Bank*, 28 Misc. 619, 59 N. Y. Supp. 1066.

18. See the Article on Mandamus, 2 Fiero on Particular Actions and Proceedings, p. 1363. See, *Nassau Electric*

Co. v. White, 12 Misc. 631, 34 N. Y. Supp. 960.

19. *Gredinger v. Higgins*, 139 App. Div. 606, 124 N. Y. Supp. 22.

Intervening defendant.—In an action by a licensee to restrain a commissioner of licenses from revoking its license, a person who has preferred charges with the commissioner against the licensee may not intervene as defendant where he shows no other interest than that of a private citizen. *Hapgoods v. Bogart*, 124 App. Div. 875, 109 N. Y. Supp. 537.

20. *Genessee Recreation Co. v. Edgerton*, 172 App. Div. 464, 158 N. Y. Supp. 421.

21. **Refreshment stand in park.**—One

cannot be revoked merely because other landowners complain.²² The arbitrary revocation of a theatrical license may in some cases be restrained,²³ as where the municipal authorities attempt to revoke all of the common show licenses in the city.²⁴ But, if in the regulation of moving picture or other theatres, the officials are not abusing their discretion, injunction will not lie.²⁵

ARTICLE IV.

ENFORCEMENT OF CORPORATE DUTIES.

A. Municipal corporations.

1. In general.

Ordinarily the remedy to compel a municipal corporation or an officer thereto to perform a duty is an order of man-

holding a license to sell refreshments in a park owned by the city of New York, who in reliance thereon has paid the license fee for the first year, which has not expired, and has expended \$2,800 in the erection of buildings and who has not been guilty of any default or violation of his contract obligation, is entitled to an injunction restraining the park commissioner from removing or demolishing said buildings, until it has been determined that the removal is ordered in good faith and for the purpose of enabling the commissioner to execute a plan adopted for the development of the park system. Under such circumstances, the plaintiff has no adequate remedy at law. *Gredinger v. Higgins*, 139 App. Div. 606, 124 N. Y. Supp. 22.

22. *Hinman v. Clarke*, 121 App. Div. 105, 105 N. Y. Supp. 725, affirming, 51 Misc. 252, 100 N. Y. Supp. 1068, affirmed, 193 N. Y. 640.

Issuance of license for moving building.—Public officials cannot be enjoined from performing their official duties unless the acts threatened by them would be unauthorized or in violation of law. Where a motion for an injunction in an action to enjoin the president of the borough of Brooklyn from issuing a permit for the removal

of two frame houses located on an avenue in said borough to any other place is predicated solely on a claim that if the permit were granted the trees and shrubs of the parking in the center of the avenue for the distance the houses would be moved would be destroyed to the injury of plaintiff and other abutting owners, the motion must be denied where concededly the borough president under section 383 of the Greater New York Charter has power to issue the permit. *Kingsley v. Pounds*, 96 Misc. 27, 166 N. Y. Supp. 228.

23. *Life Photo Film Corp. v. Bell*, 90 Misc. 469, 154 N. Y. Supp. 763.

The mayor of the city of Rochester has power to issue a license for a moving picture show and to revoke the same without notice to the licensee. *Genesee Recreation Co. v. Edgerton*, 172 App. Div. 464, 158 N. Y. Supp. 421.

24. *Fox Amusement Co. v. McClellan*, 62 Misc. 100, 114 N. Y. Supp. 594.

25. *Message Photo-Play Co. v. Bell*, 179 App. Div. 13, 166 N. Y. Supp. 338; *Edelstein v. Bell*, 91 Misc. 620, 155 N. Y. Supp. 590; *Universal Film Mfg. Co. v. Bell*, 100 Misc. 281, 167 N. Y. Supp. 124, affirmed, 179 App. Div. 928, 166 N. Y. Supp. 344.

damus, not a suit in equity.²⁶ The courts may restrain a municipality or an officer thereof from committing acts which will cause irreparable damage to an individual, such as a trespass, or the creation of a nuisance.²⁷ One who is specially injured by an illegal act of a municipality or officer thereof, may have relief by way of injunction.²⁸

Equity will not ordinarily interfere with matters largely in the discretion of municipal authorities;²⁹ but has power to do so if action is threatened which will produce irreparable injury.³⁰ An arbitrary action by a public official may be restrained, although the matter involved is one as to which he is invested with some discretionary powers.³¹

A court of equity will not interfere by injunction with a plan of improvement adopted in good faith by municipal authorities, and within the scope of their authority, where injury therefrom is doubtful, eventual or contingent. To justify such an interference it must be shown that injury material and actual is the necessary or probable result.³²

2. Taxpayer's actions.

Section 51 of the General Municipal Law provides a remedy whereby a taxpayer of a municipality can restrain the illegal action of a municipal officer.³³ This remedy did not exist at common law. Before the enactment of this statutory remedy, a taxpayer was not permitted to maintain an action to restrain a municipal act, unless the act

²⁶ *Wurster v. City of New York*, etc., 66 Misc. 541, 115 N. Y. Supp. 192, affirmed, 199 N. Y. 534; *Johnson-Kahn Co. v. Thompson*, 73 Misc. 103, 130 N. Y. Supp. 216.

Canal Board.—The Supreme Court has jurisdiction to entertain an action for mandatory injunction to compel the State Canal Board to comply with the Barge Canal Act. *Easton v. Canal Board*, 166 App. Div. 316, 152 N. Y. Supp. 56, affirmed, 216 N. Y. 486.

Incorporation of village.—An injunction will not be granted to restrain the incorporation of a village. *Willis v. Stapels*, 30 Hun 644; *Stephens v. Minnerly*, 3 Hun 566, 6 T. & C. 318. See also, *People v. Clark*, 70 N. Y. 518.

²⁷ *People v. Canal Board of N. Y.*, 55 N. Y. 390.

²⁸ *People v. Canal Board of N. Y.*, 55 N. Y. 390.

²⁹ *People v. Dwyer*, 90 N. Y. 402; *Morgan v. City of Binghamton*, 102 N. Y. 500; *People ex rel. Roosevelt v. Edson*, 52 Super. Ct. (20 J. & S.) 53, 1 How. Pr. N. S. 482.

³⁰ *People v. Dwyer*, 90 N. Y. 402.

³¹ *Tribune Assn. v. Sun Printing, etc., Assn.*, 7 Hun 175.

³² *Morgan v. City of Binghamton*, 102 N. Y. 500, reversing 32 Hun 602.

³³ The remedy by taxpayer's action is discussed in *Fiero on Particular Actions and Proceedings*, vol. 3, page 2792.

affected his individual interests as distinct from that of other taxpayers.³⁴ Nor could the People of the State, by its Attorney-General, intervene by action to protect the property rights and interests of municipal corporations.³⁵ The helplessness of the taxpayers when municipal officers were faithless to their trusts required a statutory remedy such as now found in the General Municipal Law.³⁶

3. Title to office.

The proper form of action to determine the controversy as to the title of a public office is an action in the nature of *quo warranto* under Article 75 of the Civil Practice Act.³⁷ Equity declines to interfere in such a controversy.³⁸ Hence, an injunction will not be granted to restrain the threatened removal of an officer.³⁹ A mandatory injunction will not be granted to require the reinstatement of one removed from the public service.⁴⁰ An action cannot be maintained in equity to restrain a claimant to the office from exercising it.⁴¹ Equity will not enjoin public officers from making an appointment.⁴² Nor, as a general rule, will

34. *Doolittle v. Supervisors of Broome*, 18 N. Y. 155; *Roosevelt v. Draper*, 23 N. Y. 318; *County of Albany, v. Hooker*, 204 N. Y. 1; *Korff v. Green*, 7 Abb. Pr. 108, 16 How. Pr. 140.

35. *People v. Ingersoll*, 58 N. Y. 1; *People v. Fields*, 58 N. Y. 491; *People v. Mayor of N. Y.*, 27 How. Pr. 34; *People v. Miner*, 2 Lans. 396; *Tift v. City of Buffalo*, 1 T. & C. 150, 65 Barb. 460.

36. *Ayers v. Lawrence*, 89 N. Y. 192.

37. The action of *quo warranto* is discussed in *Fiero on Particular Actions and Proceedings*, vol. 3, page 2731.

38. *Greene v. Knox*, 175 N. Y. 432; *People v. Howe*, 177 N. Y. 499; *Wilker v. Lathrop*, 210 N. Y. 434; *Palmer v. Bd. of Education*, 47 App. Div. 547, 62 N. Y. Supp. 485; *Melody v. Goodrich*, 67 App. Div. 368, 73 N. Y. Supp. 741, affirmed, 170 N. Y. 185; *McNiece v. Sohmer*, 29 Misc. 238, 61 N. Y. Supp. 193; *City of New York v. McAneny*,

115 Misc. 433, 190 N. Y. Supp. 87; *Johnston v. Garside*, 65 Hun 208, 47 St. Rep. 526, 20 N. Y. Supp. 327.

39. *People v. Howe*, 177 N. Y. 499; *Palmer v. Board of Education of N. Y.* 47 App. Div. 547, 62 N. Y. Supp. 485; *City of New York v. McAneny*, 115 Misc. 433, 190 N. Y. Supp. 87; *Lewis v. Oliver*, 4 Abb. Pr. 121. Compare, *Armatage v. Fisher*, 74 Hun 167, 56 St. Rep. 384, 26 N. Y. Supp. 364.

40. *McNiece v. Sohmer*, 29 Misc. 238, 61 N. Y. Supp. 193.

41. *Johnston v. Garside*, 65 Hun 208, 47 St. Rep. 526, 20 N. Y. Supp. 327.

42. *Melody v. Goodrich*, 67 App. Div. 368, 73 N. Y. Supp. 741, affirmed 170 N. Y. 185; *McNiece v. Sohmer*, 29 Misc. 238, 61 N. Y. Supp. 193; *New York v. McAneny*, 115 Misc. 433, 190 N. Y. Supp. 87; *People ex rel. Roosevelt v. Edson*, 52 Super. Ct. (20 J. & S.) 53, 1 How. Pr. N. S. 482. Compare *Vroman v. Fish*, 100 Misc. 613, 166 N. Y. Supp. 539.

equity interfere as against one making a hostile claim to an office in the possession of another.⁴³

B. Public utility corporations.

1. Service.

If the customer of a public utility has broken his contract by failing to pay for his service, or otherwise, the company may discontinue the service.⁴⁴ If, on the other hand the customer is not in default in his obligation, service may not be stopped, and injunction is a proper remedy to compel its continuance.⁴⁵ If a controversy arises as to which party is in default, equity may assume jurisdiction and require the continuance of service until the action is determined.⁴⁶ An express written contract between the parties is not necessary, for the rendering of service for a considerable period by the company, and its acceptance and payment therefor by the customer, may create an implied contract.⁴⁷ The action may determine the amount due from the customer to the company, and direct that upon its payment the company shall be enjoined from stopping the service.⁴⁸

In accordance with the general rule on the subject, gas,⁴⁹

43. *Welker v. Lathrop*, 210 N. Y. 434; *Coulter v. Murray*, 15 Abb. Pr. N. S. 129, 4 Daly, 506. Compare, *New York v. Conover*, 5 Abb. Pr. 252; *Seneca Nation of Indians v. John*, 27 Abb. N. C. 253, 16 N. Y. Supp. 40; *Palmer v. Foley*, 36 N. Y. Super. 14, 45 How. Pr. 110.

44. *McEntee v. Kingston Water Co.*, 165 N. Y. 27.

45. *McEntee v. Kingston Water Co.*, 165 N. Y. 27; *Richman v. Consolidated Gas Co.*, 186 N. Y. 209; *Whitmore v. New York Inter-Urban Water Co.*, 158 App. Div. 178, 142 N. Y. Supp. 1098; *Murray v. New York Teleg. Co.*, 81 Misc. 636, 143 N. Y. Supp. 534, reversed 170 App. Div. 17, 156 N. Y. Supp. 151; *Tucker v. Western Union Tel. Co.*, 95 Misc. 287, 158 N. Y. Supp. 959, affirmed 171 App. Div. 965, 156 N. Y. Supp. 1148. See also, *Singleton v. McGurk*, 117 Misc. 340, 191 N. Y. Supp. 232.

46. *McEntee v. Kingston Water Co.*,

165 N. Y. 27; *Van Nest Land Co. v. New York Water Co.*, 7 App. Div. 295, 40 N. Y. Supp. 212; *Jacob Dold Packing Co. v. Kingston County Refrigerating Co.*, 176 App. Div. 407, 163 N. Y. Supp. 1035; *Schmitt v. Edison Elec. Etc. Co.*, 58 Misc. 19, 110 N. Y. Supp. 44; *Town of Mamaroneck v. New York Interurban Water Co.*, 126 Misc. 382, 212 N. Y. Supp. 639; *Smith v. Gold & Stock Tel. Co.*, 42 Hun 454, 6 St. Rep. 110, 25 Weekly Dig. 347; *Sickles v. Manhattan Gaslight Co.*, 64 How. Pr. 33, affirmed 66 How. Pr. 304; *Sickles v. Manhattan Gaslight Co.*, 66 How. Pr. 314.

47. *McEntee v. Kingston Water Co.*, 165 N. Y. 27.

48. *J. N. Matthews Co. v. City of Buffalo*, 126 N. Y. Supp. 596.

49. *Richman v. Consolidated Gas Co.*, 186 N. Y. 209; *Sickles v. Manhattan Gaslight Co.*, 64 How. Pr. 33, affirmed 66 How. Pr. 304.

Effect of suit in Federal Courts.—

water,⁵⁰ electric,⁵¹ telephone,⁵² telegraph,⁵³ and refrigeration,⁵⁴ customers have been allowed injunctive relief as against a threatened discontinuance of service. The duty of the company is, not only to furnish service to its patrons, but also to furnish such service without discrimination. An improper discrimination may be restrained.⁵⁵

An injunction issued by the Circuit Court of the United States in a suit by a gas company of the City of New York to determine the constitutionality of a statute fixing the maximum price of gas in that city at eighty cents per 1,000 feet, alleged to be invalid as in contravention of the United States Constitution, and to restrain the enforcement of the provisions of the statute, does not prevent the maintenance of an action in the Supreme Court of this state by a consumer not a party to the former suit, to restrain the gas company from cutting off the gas from his premises for failure to pay the rate authorized before the enactment of the statute, where, although the injunction of the United States court permitted such rate to be charged, the difference to be paid into court to await the determination of the controversy, it contained no provision requiring a consumer to pay the former rate or to refrain from defending any action to recover that amount or from maintaining any action to prevent the company from enforcing payment by cutting off gas from his premises; an injunction order in such action granting the relief sought is not in conflict with that issued by the United States court, and there is nothing in the principle of comity prohibiting the state court from entertaining jurisdiction to the extent of granting it. *Richman v. Consolidated Gas Co.*, 188 N. Y. 209. See also *Schneider v. New Amsterdam Gas Co.*, 116 App. Div. 345, 101 N. Y. Supp. 535.

50. *McEntee v. Kingston Water Co.*, 165 N. Y. 27; *Van Nest Land Co. v. New York Water Co.*, 7 App. Div. 295;

40 N. Y. Supp. 212; *Whitmore v. New York Inter-Urban Water Co.*, 158 App. Div. 178, 142 N. Y. Supp. 1098; *Salmon v. Rochester & Lake Ontario Water Co.*, 120 Misc. 131, 197 N. Y. Supp. 769; *Town of Mamaroneck v. New York Inter-Urban Water Co.*, 126 Misc. 382, 212 N. Y. Supp. 639; *J. N. Matthews Co. v. City of Buffalo*, 126 N. Y. Supp. 596.

51. *Schmitt v. Edison Elec. Etc. Co.*, 58 Misc. 19, 110 N. Y. Supp. 44.

52. *Wright v. Glenn. Tel. Co.*, 112 App. Div. 745, 99 N. Y. Supp. 85; *Murray v. New York Teleg. Co.*, 81 Misc. 636, 143 N. Y. Supp. 534, reversed 170 App. Div. 17, 156 N. Y. Supp. 151.

53. *Tucker v. Western Union Tel. Co.*, 95 Misc. 287, 158 N. Y. Supp. 959, affirmed 171 App. Div. 965, 156 N. Y. Supp. 1148.

Ticker service.—The discontinuance of "ticker" service may be restrained. *Smith v. Gold & Stock Tel. Co.*, 42 Hun 454, 6 St. Rep. 110, 25 Week. Dig. 347; *Tucker v. Western Union Tel. Co.*, 95 Misc. 287, 158 N. Y. Supp. 959, affirmed 171 App. Div. 965, 156 N. Y. Supp. 1148. The customer may be enjoined at the suit of the company from violating his contract as to the use to be made of quotations. *Gold & Stock Teleg. Co. v. Todd*, 17 Hun 548.

54. *Jacob Dold Packing Co. v. Kingston County Refrigerating Co.*, 176 App. Div. 407, 163 N. Y. Supp. 1035.

55. *Wright v. Glenn. Tel. Co.*, 112 App. Div. 745, 99 N. Y. Supp. 85; *Windsor v. New York C. & H. R. R. Co.*, 82 Misc. 38, 143 N. Y. Supp. 645, affirmed, 163 App. Div. 930, 147 N. Y. Supp. 1150, affirmed 220 N. Y. 695.

If the company and the customer cannot agree as to the rate for service, an injunction will not be granted to restrain the customer from using the service. Thus, if a water company and a municipality have a controversy as to the amount to be paid for water for fire purposes, the company cannot secure an injunction to restrain the use of the hydrants.⁵⁶

2. Unreasonable rates.

One of the obligations of a public service corporation is that its rates shall be reasonable in amount. Ordinarily a rate controversy is determined by the Public Service Commission.⁵⁷ An order of the Public Service Commission, made within the scope of its jurisdiction and fixing the rate, is not subject to a collateral attack in an action of injunction.⁵⁸ But, as to corporations not within the control of the Public Service Commission, an action may properly be maintained to enjoin the imposition of unreasonable rates.⁵⁹ Water companies are not within the control of the Public Service Commission, and hence equity may assume jurisdiction of an action to restrain unreasonable rates.⁶⁰

Where a valid contract establishes a public utility rate, the company may be restrained from collecting charges in excess thereof.⁶¹ Frequently, however, it is found that provisions in a franchise fixing the maximum rate are not enforceable by consumers.⁶²

56. *West Troy Water-Works v. Green Island*, 32 Hun 530.

57. See the Article on Public Service Commission, 3 Fiero on Particular Actions and Proceedings, page 2850.

58. *Town of North Hempstead v. Public Service Corp.* 199 App. Div. 189, 191 N. Y. Supp. 394. See also, *North Hempstead v. Public Service Corp.*, 116 Misc. 585, 190 N. Y. Supp. 794, affirmed 199 App. Div. 189, 191 N. Y. Supp. 394.

59. *Whitmore v. New York Inter-Urban Water Co.*, 158 App. Div. 178, 142 N. Y. Supp. 1098; *Town of Mamaroneck v. New York Inter-Urban Water Co.*, 126 Misc. 382, 212 N. Y. Supp. 639.

Canal Tolls.—See, *New York Cement Co. v. Consolidated Rosendale Cement Co.*, 178 N. Y. 167.

60. *Whitmore v. New York Inter-Urban Water Co.*, 158 App. Div. 178, 142 N. Y. Supp. 1098; *Town of Mamaroneck v. New York Inter-Urban Water Co.*, 126 Misc. 382, 212 N. Y. Supp. 639. See also, *Johnson-Kahn Co. v. Thompson*, 73 Misc. 103, 130 N. Y. Supp. 216; *Silverberg v. Citizens Water Supply Co.*, 116 Misc. 595, 190 N. Y. Supp. 349.

61. *Farnsworth v. Boro Oil & Gas Co.*, 155 App. Div. 79, 139 N. Y. Supp. 736, affirmed 216 N. Y. 40; *Long Beach v. Long Beach Power Co.*, 104 Misc. 337, 171 N. Y. Supp. 284; *Warsaw v. Pavilion Natural Gas Co.*, 116 Misc. 435, 190 N. Y. Supp. 79; *Wackenhut v. Empire Gas, Etc. Co.*, 166 N. Y. Supp. 29.

62. *Wright v. Glenn. Tel. Co.*, 112 App. Div. 745, 99 N. Y. Supp. 85.

The action may ordinarily be maintained by a municipality or an individual who is a customer of the public utility.⁶³ A private customer may have relief, although the municipality and the company have made an agreement as to rates.⁶⁴ But an individual cannot restrain a street railway company from charging an excessive fare.⁶⁵ A municipality served by a public utility cannot generally maintain the action, unless it is a customer.⁶⁶ The Public Service Commissions Law permits an injunction to issue in certain cases on the petition of the Commission.⁶⁷

Strictly speaking, the Supreme Court has no rate making power; its power being limited to a determination as to whether certain specified rates are excessive. Yet the court may determine what rates may not be charged under the menace of cutting off the service.⁶⁸

3. Confiscatory rates.

A public utility is entitled to charge a reasonable rate for its service, and this right is protected by the United States Constitution. A State Legislature may regulate the rates to be charged, but cannot prescribe a rate which is confiscatory. The question whether a statute prescribing a particular rate is confiscatory, is one which may be determined in an action to restrain the enforcement of the rate.⁶⁹

63. *New York Cement Co. v. Consolidated Rosendale Cement Co.*, 178 N. Y. 167; *Farnsworth v. Boro Oil & Gas Co.*, 155 App. Div. 79, 139 N. Y. Supp. 736, affirmed 216 N. Y. 40; *Whitmore v. New York Inter-Urban Water Co.*, 158 App. Div. 178, 142 N. Y. Supp. 1098; *Town of Mamaroneck v. New York Inter-Urban Water Co.*, 126 Misc. 382, 212 N. Y. Supp. 639.

64. *Town of Mamaroneck v. New York Inter-Urban Water Co.*, 126 Misc. 382, 212 N. Y. Supp. 639.

65. *McNulty v. Brooklyn Heights R. Co.*, 31 Misc. 674, 66 N. Y. Supp. 57.

66. *Morrell v. Brooklyn Borough Gas Co.*, 231 N. Y. 405; *City of New York v. Citizens Water Supply Co.*, 199 App. Div. 169, 191 N. Y. Supp. 430, affirmed 235 N. Y. 584.

67. Public Service Comm. Second

Dist. v. J. & J. Rogers Co., 103 Misc. 711, 170 N. Y. Supp. 964, modified on other grounds 184 App. Div. 705, 172 N. Y. Supp. 498; *Public Service Comm. v. Westchester St. R. Co.*, 206 N. Y. 209.

68. *Whitmore v. New York Inter-Urban Water Co.*, 158 App. Div. 178, 142 N. Y. Supp. 1098; *Town of Mamaroneck v. New York Inter-Urban Water Co.*, 126 Misc. 382, 212 N. Y. Supp. 639.

69. *Albany Municipal Gas Co. v. Public Serv. Comm.* 225 N. Y. 89; *Bronx Gas & Elec. Co. v. Public Service Commission*, 190 App. Div. 13, 180 N. Y. Supp. 38; *New York v. New York Teleg. Co.*, 115 Misc. 262, 189 N. Y. Supp. 701, affirmed 202 App. Div. 796, 194 N. Y. Supp. 924, affirmed 236 N. Y. 615. See also, *Public Service Commis-*

An action may be brought against a Public Service Commission to restrain it from compelling the company to adhere to the unlawful rate.⁷⁰ In the same manner, the question may be presented whether a statutory rate, which was proper when enacted, has by reason of changed conditions, become confiscatory.⁷¹ The court will not, however, fix the rate which the company may charge, as the fixing of rates is a legislative power to be exercised directly by the law makers or through a Public Service Commission.⁷² After the unconstitutionality of the statutory rate is adjudged, the Public Service Commission may have the power to determine the rate.⁷³

C. Religious corporations.

An action in equity is not an appropriate remedy to determine the title to a church office as between rival claimants. But a distinction is to be drawn between the corporate church and the spiritual church.⁷⁴ The priest or rector of a church is not considered as an officer of the corporate church, and hence an action in the nature of a *quo warranto* may not be maintained to test his right to act as such.⁷⁵ There being no other adequate remedy to determine the right, an action in equity may be maintained, and an injunction may be granted if it is found that he assumes to fill the position without authority.⁷⁶ On the

sion v. Brooklyn Borough Gas Co., 189 App. Div. 62, 178 N. Y. Supp. 93.

70. Municipal Gas Co. v. Public Service Comm. 225 N. Y. 89.

71. Municipal Gas Co. v. Public Service Comm. 225 N. Y. 89; Bronx Gas & Elec. Co. v. Public Service Commission, 190 App. Div. 13, 180 N. Y. Supp. 38.

72. Bronx Gas & Elec. Co. v. Public Service Commission, 190 App. Div. 13, 180 N. Y. Supp. 38; Bronx Gas & E. Co. v. Public Service Comm. 108 Misc. 204, 178 N. Y. Supp. 218.

73. Bronx Gas & Elec. Co. v. Public Service Commission, 190 App. Div. 13, 180 N. Y. Supp. 38.

74. Fiske v. Beaty, 206 App. Div. 349, 201 N. Y. Supp. 441, affirmed 238 N. Y. 598.

75. Fiske v. Beaty, 206 App. Div.

349, 201 N. Y. Supp. 441, affirmed 238 N. Y. 598.

76. Fiske v. Beaty, 206 App. Div. 349, 201 N. Y. Supp. 441, affirmed 238 N. Y. 598; Christ's Church v. Collett, 208 App. Div. 695, 204 N. Y. Supp. 315; Isham v. Fullager, 14 Abb. N. C. 363.

Injunction not granted.—A court of equity will not interfere by injunction to eject a clergyman from his possession of the church and to forbid his preaching in it, where he is in office, placed there originally by the act of the parish and claiming to be rightfully there, and there is no other person claiming the office, or with whose rights as a minister of the parish the defendant is interfering; and where there is no occasion for a breach of the peace, or a conflict between two clergy-

other hand, wardens, vestrymen, trustees, and similar officials are officers of the corporate church, and their title to an office claimed by them is to be determined only in an action by the Attorney-General.⁷⁷ There is no authority for the bringing of an action by the Attorney-General, or by any other person, for the *removal* of officers of the corporation.⁷⁸

A court of equity may interfere to restrain a use of church properties which is not in accordance with the uses and rules of the religious society with which the corporation is connected.⁷⁹

D. Membership corporations.

When a member has been improperly expelled from a corporation or organization, mandamus is the usual remedy to compel his reinstatement.⁸⁰ The remedy by mandamus is a special proceeding, but the member can secure substantially the same relief by action. An action in equity can be maintained for a mandatory injunction directing the reinstatement.⁸¹ Equity will enjoin the denial to a member of the privileges of membership where the denial, if continued, will work irreparable injury.⁸² But an action cannot

men or their adherents, in conducting the worship of the congregation. *Youngs v. Ransom*, 31 Barb. 49.

77. *Fiske v. Beaty*, 206 App. Div. 349, 201 N. Y. Supp. 441, affirmed 238 N. Y. 598; *Hartt v. Harvey*, 32 Barb. 55, 10 Abb. Pr. 321, 19 How. Pr. 245; *North Baptist Church v. Parker*, 36 Barb. 171. It has been thought, however, that officers in possession of their offices can restrain rival claimants from forcibly divesting them of their possession of the property and records of the corporation, and from interfering with them while acting as officers, *Reis v. Rohde*, 34 Hun 161, 6 Civ. Prac. 406.

78. *Fiske v. Beaty*, 206 App. Div. 349, 201 N. Y. Supp. 441, affirmed 238 N. Y. 598.

79. *Fiske v. Beaty*, 206 App. Div. 349, 201 N. Y. Supp. 441, affirmed 238 N. Y. 598; *First Reformed Presbyterian Church v. Bowden*, 14 Abb. N. C. 356; *Isham v. Fullager*, 14 Abb. N. C. 363.

80. See the Chapter on Mandamus, 2 Fiero on Particular Actions and Proceedings, page 1940.

81. *Stenzel v. Cavanaugh*, 189 N. Y. Supp. 883.

82. *Simons v. Berry*, 240 N. Y. 463.

Labor union.—A complaint that alleges that plaintiff was a member in good standing of defendant's union, an unincorporated association, and subject to expulsion only upon written charges, and after a hearing upon notice; that no charges have been made against him, and no hearing has been given, but that none the less defendant's officers have notified the other members to refuse to work with him on the ground that he has ceased to be a member, and in so doing have made it impossible for him to find employment in his trade, states a cause of action for equitable relief in the absence of anything to show a provision in the constitution or by-laws whereby plaintiff has a remedy by appeal to any

be maintained to restrain the association from trying a member upon charges, where the proceedings are duly conducted according to the rules of the organization.⁸³ The courts will not interfere until the member has exhausted his remedies within the corporation,⁸⁴ but this principle is applicable only when the proceedings are commenced and conducted in conformity with the provisions of the constitution and by-laws of the organization.⁸⁵ If not so conducted, an injunction may be granted.⁸⁶

E. Private corporations.

Injunctions are frequently granted to restrain the officers of a corporation from an unlawful alienation of the property of the corporation.⁸⁷ The remedy afforded for the illegal conduct of a corporation in the exercise of franchises or privileges not conferred upon it by law, is an action under the General Corporation Law for the annulment of the company and the restraint of its activities.⁸⁸ An action to restrain the usurpation of a franchise may also be maintained under Article 75 of the Civil Practice Act, which action may result in an injunction under section 1218 of the Civil Practice Act.⁸⁹ Equity, as a general rule, will not assume jurisdiction of a controversy involving the disputed title to an office of a corporation.⁹⁰ Section 32 of the

organ within the association. *Simons v. Berry*, 240 N. Y. 463.

83. *Moyse v. N. Y. Cotton Exchange*, 143 App. Div. 265, 128 N. Y. Supp. 112; *Franklin v. Burnham*, 40 Misc. 566, 82 N. Y. Supp. 882. See also, *Hurst v. New York Produce Exchange*, 100 N. Y. 605.

Medical society.—A court of equity will not enjoin a medical society from inquiring into the alleged unprofessional conduct either of its members or of non-members. The remedy of the aggrieved party is to ignore the proceedings, or, if he has been libeled, to sue for damages. *Ewald v. Medical Society*, 144 App. Div. 82, 128 N. Y. Supp. 886.

84. *Thomas v. Musical Union*, 121 N. Y. 45; *Moyse v. N. Y. Cotton Exchange*, 143 App. Div. 265, 128 N. Y.

Supp. 112; *O'Connor v. Morrin*, 109 Misc. 379, 179 N. Y. Supp. 599; *Sons of Italy v. Supreme Lodge*, 125 Misc. 572, 211 N. Y. Supp. 548.

85. *Quentell v. New York Cotton Exch.*, 56 Misc. 150, 106 N. Y. Supp. 228.

86. *Quentell v. New York Cotton Exch.*, 56 Misc. 150, 106 N. Y. Supp. 228; *Sons of Italy v. Supreme Lodge*, 125 Misc. 572, 211 N. Y. Supp. 548.

87. This remedy is discussed in *Fiero on Particular Actions and Proceedings*, vol. 1, page 706.

88. This remedy is discussed in *Fiero on Particular Actions and Proceedings*, vol. 1, page 793.

89. This remedy is discussed in *Fiero on Particular Actions and Proceedings*, vol. 3, page 2730.

90. *Merchants Loan & Ins. Corp. v.*

General Corporation Law authorizes a statutory proceeding for the review of corporate elections.⁹¹

ARTICLE V.

JUDICIAL PROCEEDINGS.

A. In general.

Courts of equity have always assumed the power to restrain proceedings at law, where the exercise of the jurisdiction was essential to the complete administration of justice, and the proper security of the rights of litigants.⁹² This power was particularly important under the old practice, when law and equity were administered by different tribunals, and equitable defenses were not heard in legal actions.⁹³ Then, a party having an equitable defense to an action at law had to invoke the power of an equitable court which would enjoin the prosecution of the action at law until the equitable rights of the parties were determined. With the adoption of the Constitution of 1846, the functions of the Court of Chancery devolved upon the Supreme Court,

Abrahamson, 242 N. Y. 587; Ciancimino v. Man, 1 Misc. 121, 20 N. Y. Supp. 702.

"A court of equity has no inherent power to try the disputed title to corporate office, and to enjoin one in possession from the exercise of its functions at the suit of a rival claimant. Such may be done and judgment of ouster rendered only in an action in the nature of a *quo warranto*, instituted by the attorney-general on behalf of, and in the name of, the people. Where, however, the particular case presents other features calling for relief, which are of equitable cognizance, and the trial of a disputed title to the corporate office is only incidental thereto, the court may inquire into the legality of the action, and grant such relief as the special exigencies require. But its judgment cannot go to the extent of ousting a *de facto* officer, nor will it be permitted to have that ef-

fect." Ciancimino v. Man, 1 Misc. 121, 20 N. Y. Supp. 702.

91. This remedy is discussed in Fiero on Particular Actions and Proceedings, vol. 1, page 730.

Amendment to by-laws.—A stockholder and officer of a cemetery corporation cannot maintain an action, brought not on behalf of other stockholders similarly situated or on behalf of the corporation, but individually, for the purpose of restraining the holding of a special meeting of directors called for the purpose of amending the by-laws, where he fails to show that anything proposed to be done at the meeting will be injurious to the interests of the society, or its stockholders, or to himself individually. Gilleran v. Springfield L. I. Cemetery Soc., 161 App. Div. 597, 146 N. Y. Supp. 828.

92. Erie R. Co. v. Ramsey, 45 N. Y. 637; Fielding v. Lucas, 87 N. Y. 197; Woodruff v. Bunce, 9 Paige 443.

93. Fielding v. Lucas, 87 N. Y. 197.

but the union of the two courts did not abrogate the equitable power to restrain, in a proper case, the maintenance of an action at law.⁹⁴ Various statutory enactments have extended the issues triable in an action at law, permitting the interposition of equitable defenses, and have thus rendered unnecessary the intervention of equity in cases where formerly the restraint of the legal action was necessary.⁹⁵ But then, as now, equity would not interfere if the complainant had a defense to the action which he desired to restrain.⁹⁶

Under the modern system, as a general rule, equity will not entertain an action to restrain the maintenance of an action at law.⁹⁷ Equity may intervene where there are spe-

94. *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *Fielding v. Lucas*, 87 N. Y. 197. "The jurisdiction of a court of equity to restrain proceedings at law in cases where the exercise of this jurisdiction is essential to the complete administration of justice, and the proper security of the rights of litigants, has been devolved upon the Supreme Court under its present organization, and has not been abrogated, or abridged, in any of the essential features, by the union of the two jurisdictions in law and equity, in a single tribunal. * * * But it is quite obvious that the occasions for the exercise of this jurisdiction, are much less frequent under a system which permits equitable defenses, and the administration of legal and equitable remedies, in the same action. Formerly, a party against whom an action at law was brought, to which an equitable defense alone existed, was compelled to go into chancery for relief, and the jurisdiction to restrain the action at law, was essential to give effect to the equitable remedy. It is not necessary here to trace the extent of the jurisdiction, or notice the limitations under which it is exercised; it is sufficient to say that it was exerted, when necessary, to prevent injustice, to avoid multiplicity of actions, and to prevent interference where the juris-

diction of equity had once attached, when interference would render the jurisdiction ineffectual." *Fielding v. Lucas*, 87 N. Y. 197.

95. *Fielding v. Lucas*, 87 N. Y. 197.

96. *Hall v. Fisher*, 1 Barb. Ch. 53; *Davis v. American Life Ins. & Trust Co.*, 4 Edw. Ch. 308; *Norton v. Woods*, 5 Paige 249, affirmed, 22 Wend. 520; *Mitchell v. Oakley*, 7 Paige 68; *West v. New York*, 10 Paige 539; *New York Dry Dock Co. v. American L. Ins. Etc. Co.*, 11 Paige 384.

97. *Savage v. Allen*, 54 N. Y. 458; *Burke v. Burke*, 212 N. Y. 303; *Minor v. Webb*, 10 Abb. Pr. 284; *Hayward v. Hood*, 39 Hun 596; *Cowper v. Theall*, 40 Hun 520, 2 St. Rep. 108. "In this state, since the adoption of the system of practice now existing, the equitable jurisdiction of a court to restrain proceedings at law in another court can be but seldom invoked. For there are but few courts, and they inferior, which have only a common law jurisdiction. The courts of original jurisdiction are mostly possessed of both equitable and common-law powers, and they are moreover mostly of co-ordinate jurisdiction. So that it may have been well held that one court of equitable jurisdiction may not, as a usual procedure, restrain the proceedings in another court of equal powers.

cial circumstances which demonstrate that full justice cannot be done in the action at law, and that an action in equity is necessary to secure to a party a more complete enjoyment of the rights to which he is entitled than could be obtained in an action at law.⁹⁸ Equitable jurisdiction depends upon the necessity of intervention.⁹⁹ A suit in equity to restrain the prosecution of an action at law between the same parties will not be entertained, where the questions in dispute can be disposed of in the action at law.¹ One cannot maintain a suit to restrain an action at law if his claims can be asserted as a defense to the action.² Or, if the equitable

For one, as much as the other, has in most cases the means of doing exact justice to all the suitors before it, and may, as well as the other, afford to the suitor any remedy equitable or legal to which he is entitled, and in any proceeding consistent with its established rules and practice, though it would be too much to say that, in no case, can a court restrain the suitors in another court of co-ordinate powers. Thus the jurisdiction of a court of equity to interfere to prevent a multiplicity of suits, or to draw to one action cognate questions and interests sought to be litigated in many actions, is well established." *Erie R. Co. v. Ramsey*, 45 N. Y. 637.

98. *Pennsylvania Coal Co. v. Delaware, Etc. Canal Co.*, 31 N. Y. 91; *Burke v. Burke*, 212 N. Y. 303; *Warnock Uniform Co. v. Garifalos*, 170 App. Div. 674, 156 N. Y. Supp. 637, reversed on other grounds, 224 N. Y. 522; *Grinnan v. Platt*, 31 Barb. 328; *National Drama Corp. v. Burns*, 183 N. Y. Supp. 739, affirmed 194 App. Div. 959, 185 N. Y. Supp. 943; *Cuthbert v. Chauvet*, 37 St. Rep. 941, 20 Civ. Proc. R. 391, 14 N. Y. Supp. 385. "There can be no doubt of the power of the court to restrain proceedings in other courts, where the exercise of such jurisdiction is essential to the complete administration of justice." *Cuthbert v. Chauvet*, 37 St. Rep. 941, 20 Civ. Proc. 391, 14 N. Y. Supp. 385.

"No ground of the jurisdiction of a court of equity is better established than that upon which it stands, when it restrains proceedings in a court of law. Where a party plaintiff is making use of the jurisdiction at law contrary to equity and good conscience, and where a party defendant has a good defense to an action at law, which, by mistake, accident or fraud of the other party, he is prevented from making, equity will interpose and make the defence available, and the remedy effectual by injunction." *Erie R. Co. v. Ramsey*, 45 N. Y. 637.

99. *Bomeisler v. Forster*, 154 N. Y. 229; *Dainese v. Allen*, 3 Abb. Pr. 212; *Morse v. Cloyes*, Seld. Notes, 184.

1. *People v. Wasson*, 64 N. Y. 167; *Pond v. Harwood*, 139 N. Y. 111; *Reis v. Graham*, 122 App. Div. 312, 106 N. Y. Supp. 645; *Bowman v. Poppenberg*, 53 Misc. 373, 103 N. Y. Supp. 245; *Producers Royalty Co., Inc. v. Ottinger*, 129 Misc. 694, 222 N. Y. Supp. 373; *Lazarus v. Danziger*, 27 Abb. N. C. 147, 16 N. Y. Supp. 200; *Carpenter v. Keating*, 10 Abb. Pr. N. S. 223; *Hayward v. Hood*, 39 Hun 596; *Cowper v. Theall*, 40 Hun 520, 2 St. Rep. 108; *Von Prochazka v. Von Prochazka*, 3 N. Y. Supp. 301, 21 St. Rep. 309; *Willard v. Bullard*, 18 St. Rep. 794, 3 N. Y. Supp. 683.

2. *Savage v. Allen*, 54 N. Y. 458; *Wolfe v. Burke*, 56 N. Y. 115; *Wallack v. Society for Reformation, Etc.*, 67

action holds out no promise of relief which could not be secured in the legal action, there is no occasion for interference.³ The equitable power should be "sparingly" exercised.⁴ An application to the court of equity for the exercise of its prohibitory powers or restrictive energies

N. Y. 23; *Burke v. Burke*, 212 N. Y. 303; *Porter v. English*, 17 App. Div. 432, 45 N. Y. Supp. 182; *Pratt v. Roman Catholic Orphan Asylum*, 20 App. Div. 352, 46 N. Y. Supp. 1035, affirmed 166 N. Y. 593; *Bodine v. Williamson*, 134 App. Div. 688, 119 N. Y. Supp. 500; *Motor Car Equipment Co. v. Abeles*, 191 App. Div. 600, 181 N. Y. Supp. 640; *Producers Royalty Co., Inc. v. Ottinger*, 129 Misc. 694, 222 N. Y. Supp. 373; *Winfield v. Bacon*, 24 Barb. 154; *Perault v. Rand*, 10 Hun 222; *Hayward v. Hood*, 39 Hun 596; *Bradley Salt Co. v. Keating*, 61 Hun 251, 40 St. Rep. 859, 16 N. Y. Supp. 795; *Bullard v. Bearss*, 3 N. Y. Supp. 683; *Richardson v. Davidson*, 5 N. Y. Supp. 617, 2 Silv. Sup. Ct. 194, 24 St. Rep. 638; *National Drama Corp. v. Burns*, 183 N. Y. Supp. 739, affirmed 194 App. Div. 959, 185 N. Y. Supp. 943; *American Waterworks Co. v. Venner*, 45 St. Rep. 441, 18 N. Y. Supp. 379. "The proposition that a separate action may, under our present system, be maintained to restrain by injunction the proceedings in another suit, in the same or in another court, between the same parties, where the relief sought in the later suit may be obtained by a proper defense to the former one, has long since been exploded or, if not, should be without delay." *Savage v. Allen*, 54 N. Y. 458.

Maker of note.—An agreement made between the maker and an indorser of a promissory note, by which the indorser was to be made treasurer of a corporation of which the parties were trustees, and the fact of the subsequent removal of the indorser from that position, afford no ground for an action and injunction to prevent the

enforcement of such note by a holder thereof, not a party to the agreement, although a trustee of the corporation and (having knowledge of the agreement) voting for such removal. Such facts, if they constitute a defense to the note, should be set up in the suit brought to enforce the note. *Porter v. English*, 17 App. Div. 432, 45 N. Y. Supp. 182.

3. *Burke v. Burke*, 212 N. Y. 303.

Oral evidence inadmissible.—In a suit to foreclose a chattel mortgage which is expressly made payable on demand, it is error to admit evidence of an alleged verbal agreement by which demand for payment was not to be made so long as the mortgagor performed certain agreements, for such evidence contradicts the terms of the written instrument. Hence, such alleged oral agreement is not ground for enjoining the mortgagee's foreclosure. *Kelly v. Ruppert*, 173 App. Div. 116, 159 N. Y. Supp. 366.

4. *Kerngood v. Pond*, 84 App. Div. 227, 82 N. Y. Supp. 723. "The jurisdiction of a court of equity by action to restrain proceedings in actions pending in courts of law, should be sparingly exercised, and only when other remedies are inadequate and the equities invoking its jurisdiction are apparent and strong. There is no hard and fast rule about it, and every case must depend largely upon its own circumstances." *Lown v. Spoon*, 158 App. Div. 900, 143 N. Y. Supp. 275.

Seldom granted.—"For one court to restrain proceedings in another court of equal dignity already possessed of a litigation is a high exercise of authority; and will seldom be done where the first court has means to render full

must come recommended by the dictates of conscience and be sanctioned by the clearest principles of justice.⁵ Relief may be denied on the ground that an adequate remedy at law exists for the protection of the rights of the parties; or on the ground that the allowance of an injunction is discretionary and that the discretion will not be affirmatively exercised when the parties have adequate redress in an action at law.⁶

Equity will not intervene merely because the issues in an equitable action are broader, and might aid a party in developing favorable testimony.⁷ The fact that an obligation is infected with fraud,⁸ or is *ultra vires*,⁹ or that its transfer to the plaintiff is champertous,¹⁰ does not authorize a suit to restrain its enforcement, for these matters may be urged as a defense. The alleged unconstitutionality of a statute under which an action is brought, is not ordinarily ground for equitable interference.¹¹ The defense of *res adjudicata* is one to be interposed by an answer rather than to be used as a ground for affirmative equitable relief.¹²

B. Action as substitute for appeal.

An action in equity to restrain legal proceedings is not to be used as a substitute for appeal.¹³ That is to say, if a determination within the jurisdiction of a tribunal is subject to direct review by appeal or by order of certiorari, a court of equity will not usually interfere.¹⁴ It is not the duty of a court of equity, nor has it the power, to constitute itself, in effect, an appellate tribunal for the purpose of determin-

justice between the parties." Von Prochazka v. Von Prochazka, 3 N. Y. Supp. 301, 21 St. Rep. 309.

5. Michael v. Kronthal, 13 Misc. 428, 34 N. Y. Supp. 681.

6. Savage v. Allen, 54 N. Y. 458.

7. Aetna Explosives Co. v. Bassick, 176 App. Div. 577, 193 N. Y. Supp. 917, affirmed 220 N. Y. 767.

8. Motor Car Equipment Co. v. Abeles, 191 App. Div. 600, 181 N. Y. Supp. 640.

9. Mott v. U. S. Trust Co., 19 Barb. 568.

10. Bodine v. Williamson, 134 App. Div. 688, 119 N. Y. Supp. 500.

11. Wallach v. Society for Reformation, 67 N. Y. 23.

12. Jay's Case, 6 Abb. Pr. 293.

13. Wordsworth v. Lyon, 5 How. Pr. 463.

14. Hyatt v. Bates, 40 N. Y. 164; McIntyre v. Hernandez, 7 Abb. Pr. N. S. 214, 39 How. Pr. 121; Bliss v. Murray, 17 Civ. Proc. 64, 7 N. Y. Supp. 917; Jackson v. Stiles, 61 How. Pr. 261; Wright v. Fleming, 12 Hun 469, affirmed 76 N. Y. 517; Wright v. Fleming, 7 Hun 608, reversed on other grounds, 71 N. Y. 612.

ing whether the discretion exercised by another tribunal was exercised in a manner agreeable to its conscience.¹⁵

C. Action substitute for change of venue.

An action in equity to restrain the maintenance of an action is not permitted where its purpose is merely to effect a change of venue. That is to say, when an action is started in one county, the defendant cannot commence an action in another county asking that the maintenance of the former action be restrained, where there is no ground for relief other than the convenience of the parties or their witnesses.¹⁶

D. Stay of proceedings contrasted.

An order whereby the Supreme Court stays the proceedings in an action in another court having jurisdiction of the subject matter, is very seldom granted.¹⁷ A restraining order of this character is granted only when the equities are "apparent and strong,"¹⁸ or in case of "extreme emergency."¹⁹ Ordinarily a stay of proceedings is ordered, if at all, by the court in which the action is pending.²⁰ It is clear, however, that the Supreme Court, sitting as a court of equity, may, in a proper case, by order stay proceedings pending in another court of the State.²¹ An order in such a case is equivalent to an injunction *pendente lite*,²² and hence is granted only when the action is equitable in nature and the plaintiff demands such relief by formal prayer.²³

15. *Hollister v. Sinclair*, 89 Hun 421, 69 St. Rep. 793, 35 N. Y. Supp. 407.

16. *Reis v. Graham*, 122 App. Div. 312, 106 N. Y. Supp. 645.

17. *Kerngood v. Pond*, 84 App. Div. 227, 82 N. Y. Supp. 723.

18. *Kerngood v. Pond*, 84 App. Div. 227, 82 N. Y. Supp. 723.

19. *Gould v. Edison Electric Illuminating Co.*, 26 Misc. 64, 56 N. Y. Supp. 465.

20. *Grammer v. Greenbaum*, 146 App. Div. 3, 130 N. Y. Supp. 569; *Raymore Realty Co. v. Pfotenhauer*, 139 App. Div. 126, 123 N. Y. Supp. 875; *North Central Realty Co. v. Blackman*, 145 App. Div. 199, 129 N. Y. Supp. 1005; *Hayward v. Hood*, 39 Hun 596.

21. *Schuehle v. Reiman*, 86 N. Y. 270; *Cushman v. Leland*, 93 N. Y. 652; *Pond v. Harwood*, 139 N. Y. 111; *Metropolitan Trust Co. v. Stallo*, 166 App. Div. 629, 152 N. Y. Supp. 183; *Seaboard Nat. Bank v. Reid*, 172 App. Div. 135, 158 N. Y. Supp. 250; *Gaunt v. Nemours Trading Corp.* 194 App. Div. 668, 186 N. Y. Supp. 92. See also, *Kaufman v. Schwartz*, 174 App. Div. 239, 160 N. Y. Supp. 1056; *Schell v. Erie R. Co.*, 51 Barb. 368, 4 Abb. Pr. N. S. 287, 35 How. Pr. 438; *Pike v. Mechanics, Etc. Bank*, 81 Hun 78, 30 N. Y. Supp. 952.

22. *Indestructible Metal Prod. Co. v. Summergrade*, 197 App. Div. 199, 188 N. Y. Supp. 642.

23. *Belasco v. Klaw*, 98 App. Div. 74,

The right to stay the proceedings in another court is denied when the complaint seeks only relief as at law.²⁴ The court assumes greater power in the staying of subsequent actions than in staying prior actions.²⁵ So, too, when an action is brought for the reformation or rescission of an agreement, or for the specific performance thereof, injunctive relief may properly be granted during the pendency of the action to avoid other litigation relating to the same subject matter.²⁶

E. Restraint of equitable action.

The equitable jurisdiction to restrain the maintenance of other actions is not necessarily limited to actions at law; actions in equity may be likewise restrained where such course is necessary for the protection of the parties.²⁷ Equi-

90 N. Y. Supp. 593; *Gilroy v. Everson-Hickok Co.*, 120 App. Div. 207, 105 N. Y. Supp. 188; *Webster v. Columbian Nat. L. Ins. Co.*, 131 App. Div. 837, 116 N. Y. Supp. 404, affirmed 196 N. Y. 523; *North Central Realty Co. v. Blackman*, 145 App. Div. 199, 129 N. Y. Supp. 1005; *Grammer v. Greenbaum*, 146 App. Div. 3, 130 N. Y. Supp. 569; *Seaboard Nat. Bank v. Reid*, 172 App. Div. 135, 158 N. Y. Supp. 250; *Indestructible Metal Prod. Co. v. Summergrade*, 197 App. Div. 199, 188 N. Y. Supp. 642; *Gould v. Edison Electric Illuminating Co.*, 26 Misc. 64, 56 N. Y. Supp. 465; *Bradley Salt Co. v. Keating*, 61 Hun 251, 40 St. Rep. 859, 16 N. Y. Supp. 795.

24. *Indestructible Metal Prod. Co. v. Summergrade*, 197 App. Div. 199, 188 N. Y. Supp. 642.

25. "Where the object of two legal proceedings is the same, convenience as well as a proper regard for the rights of debtor and creditor require if possible that the fund in which both are interested should be subjected to diminution by one litigation only, and the parties themselves spared the unnecessary labor and expense of conducting two controversies over the same matter. It would seem also that if both tribunals, whose interference has been

invoked, have equal or concurrent jurisdiction, it should continue to be exercised by that one whose process was first issued. (*Rogers v. King*, 8 Pai. 210; *Groshon v. Lyon*, 16 Barb. 461; *Travis v. Myers*, 67 N. Y. 542.) It is well settled that to secure this end an order may be made by the Supreme Court restraining proceedings in all but one action, whether they are pending in that court or before other tribunals, as in *Rogers v. King* (supra) where one creditor was proceeding against an executor in chancery and another by citation before the surrogate, each calling for an account; or in *Travis v. Myers* (supra) where several actions were pending in the Supreme Court against an assignee for the benefit of creditors for an accounting and settlement of the trust." *Schule v. Reiman*, 86 N. Y. 270.

26. *Blumenfeld v. Aronson*, 196 App. Div. 189, 187 N. Y. Supp. 585; *Humphreys v. Hurtt*, 3 Hun 216. And see the Chapters on Reformation, Rescission, Specific Performance.

27. "There can be no doubt that the Supreme Court may, in a proper case, perpetually stay the proceedings of the plaintiff in an equitable action at the suit of his adversary in another equitable action. Formerly the Court of

table actions may be restrained where their continuance leads to a multiplicity of suits.²⁸ But an injunction to restrain a suit for an injunction is an anomalous proceeding, and is without authority.²⁹

F. Multiplicity of suits.

One of the grounds of equitable interference is the threatening of a multiplicity of suits.³⁰ Where many persons have claims and are prosecuting, or are about to prosecute them at law, against one defendant or a class of defendants, or a fund liable in equal degree to all those persons and to others, a court of equity, to forestall a multiplicity of actions, has jurisdiction of an action for a general accounting and adjustment of all of the rights, and to restrain separate and individual actions at law in the same or other courts, thus bringing all of the litigation into one suit.³¹ This form of action is sometimes described as

Chancery denied the existence of the jurisdiction, and said that an application for such a stay could scarcely be considered as seriously made." *Pond v. Harwood*, 139 N. Y. 111.

28. *Pond v. Harwood*, 139 N. Y. 111; *Post v. Banks*, 67 App. Div. 187, 73 N. Y. Supp. 596; *Alleghany, Etc. R. Co. v. Weidenfeld*, 5 Misc. 43, 25 N. Y. Supp. 71.

29. *Wallack v. Society for Reformation of Juvenile Delinquents*, 67 N. Y. 23; *Balogh v. Lyman*, 6 App. Div. 271, 39 N. Y. Supp. 780.

30. *Third Ave. R. Co. v. Mayor*, 54 N. Y. 159; *Saratoga County v. Deyoe*, 77 N. Y. 219; *National Park Bank v. Goddard*, 131 N. Y. 494; *Carpenter v. Keating*, 10 Abb. Pr. N. S. 223; *Woodruff v. Fisher*, 17 Barb. 224; *Lawrence v. Manning*, 31 St. Rep. 78, 9 N. Y. Supp. 223; *Babcock v. Arkenburgh*, 22 Weekly Dig. 478.

31. *Pfohl v. Simpson*, 74 N. Y. 137; *Saratoga County v. Deyoe*, 77 N. Y. 219; *National Park Bank v. Goddard*, 131 N. Y. 494; *Kellogg v. Siple*, 11 App. Div. 458, 42 N. Y. Supp. 379; *Illinois Surety Co. v. Mattone*, 138 App. Div. 173, 122 N. Y. Supp. 928.

"In 2 Story's Equity Jurisprudence (§ 854) it is said in regard to bills of peace: 'One class of cases to which this remedial process is properly applied is where there is one general right to be established against a great number of persons. And it may be resorted to either where one person claims or defends a right against many or where many claim or defend a right against one. In such cases courts of equity interpose in order to prevent multiplicity of suits, for, as each separate party may sue or may be sued in a separate action at law, and each suit would only decide the particular right in question between the plaintiff and the defendant in that action, litigation might become interminable. Courts of equity, therefore, having a power to bring all the parties before them, will at once proceed to the ascertainment of the general right, and, if it be necessary, they will ascertain it by an action or issue at law and then make a decree finally binding upon all the parties.'" *Kellogg v. Siple*, 11 App. Div. 458, 42 N. Y. Supp. 379.

a bill of peace.³² It is immaterial whether the rights of action arise from general principles of law or from particular provisions of constitution or statute.³³ But the bringing into one action of all parties similarly situated, does not give a right or impose a liability which does not otherwise exist.³⁴ The action can be maintained to determine a large number of claims to a fund in court, although the plaintiff insists that none of the claimants are entitled to any share in the fund.³⁵ It is not important that the plaintiff has no cause of action against any particular defendant.³⁶ Nor is it necessary that the claims of the defendants be of an equitable character, either actions at law or at equity may be restrained.³⁷ The rule (if any remnant of the rule remains) that equity will not interfere until there has been a trial at law does not apply here, for the reason that a trial at law of one of the cases would not be binding in the other cases. The fact that there is or will be a multiplicity of suits indicates the inadequacy of legal methods and reme-

32. *Allegany, etc., R. Co., v. Weidenfeld*, 5 Misc. 43, 25 N. Y. Supp. 71.

"A bill of peace, enjoining litigation at law, seems to have been allowed only in one of these two cases; either where the plaintiff has already, satisfactorily, established his right at law, or where the persons who controvert it are so numerous as to render an issue, under the direction of this court, indispensable to embrace all the parties concerned, and to save multiplicity of suits." *Eldredge v. Hill*, 2 Johns. Ch. 281.

33. *Pfohl v. Simpson*, 74 N. Y. 137.

34. *Pfohl v. Simpson*, 74 N. Y. 137.

35. *Illinois Surety Co. v. Mattone*, 138 App. Div. 173, 122 N. Y. Supp. 928.

36. *Kellogg v. Siple*, 11 App. Div. 458, 42 N. Y. Supp. 379. Compare, *Allegany, etc., R. Co., v. Weidenfeld*, 5 Misc. 43, 25 N. Y. Supp. 71.

37. *Saratoga County v. Devoe*, 77 N. Y. 219; *Kellogg v. Siple*, 11 App. Div. 458, 42 N. Y. Supp. 379; *Allegany, etc., R. Co. v. Weidenfeld*, 5 Misc. 43, 25 N. Y. Supp. 71.

Bank deposits.—The Chenango Valley Savings Bank received deposits

from some 146 persons, amounting in the aggregate to some \$150,000, and issued to them, without authority, pass books bearing the name of, and reciting that the money had been deposited in the National Broome County Bank. Both banks became insolvent and the receiver of the Broome County Bank brought an action, alleging in the complaint the foregoing facts and further that the depositors, defendants therein, had made demand for their money, and had brought or threatened to bring actions and were inspired to do so by the Chenango Savings Bank, also a party defendant; that the pass books were prima facie evidence of indebtedness, although issued without authority and not in fact valid claims, against the Broome County Bank; that the testimony of divers persons, old and in feeble health, would be required, and that there was danger that it might be lost in the case of a number of separate suits being brought. To this complaint the defendants demurred. Held, that the complaint stated a good cause of action. *Kellogg v. Siple*, 11 App. Div. 458, 42 N. Y. Supp. 379.

dies, and presents the occasion for the exercise of equitable jurisdiction.³⁸ If, however, one of the numerous actions is in such form that all of the questions involved can be satisfactorily determined therein, there is no object in restraining the prosecution of that action.³⁹ Or, if the plaintiff's action will not have the effect of settling all of the questions in dispute, the prosecution of other actions should not be enjoined.⁴⁰ It is only in extreme and clear cases that equity assumes control of the situation.⁴¹

Equity has jurisdiction of an action by one plaintiff against one defendant, where there are numerous threatened actions between the two parties in which the same question is involved.⁴²

G. Proceedings in federal courts.

The established rules of constitutional law forbid a State court from any effort to control proceedings in federal courts.⁴³ The earlier cases made a distinction between the power to enjoin the proceedings in a United States court, and the power to restrain litigants from prosecuting a proceeding. In cases where the courts had concurrent jurisdiction, the State courts formerly assumed the power to forbid a resident litigant from continuing a case in the federal courts;⁴⁴ but were very cautious in the exercise of this power, generally denying such relief.⁴⁵ But after a

38. *Kellogg v. Siple*, 11 App. Div. 458, 42 N. Y. Supp. 379. But see, *Pennsylvania Coal Co. v. Delaware, etc., Canal Co.*, 31 N. Y. 91.

39. *Illinois Surety Co. v. Mattone*, 138 App. Div. 173, 122 N. Y. Supp. 928.

40. *National Union Bank v. London & River Plate Bank*, 2 App. Div. 208, 73 St. Rep. 495, 37 N. Y. Supp. 741.

41. *Manhattan Ry. Co. v. N. Y. El. Ry. Co.*, 29 Hun 309.

42. *Third Ave. R. Co. v. New York*, 54 N. Y. 159; *Fraley & Carey Co. v. Delmont*, 110 App. Div. 468, 97 N. Y. Supp. 408.

43. *Beardslee v. Ingraham*, 183 N. Y. 411; *Clark v. Bankers' Trust Co.*, 177 App. Div. 627, 164 N. Y. Supp. 544; *Mariposo Co. v. Garrison*, 26 How. Pr. 448.

Patent proceeding.—A court of equity of this state will not enjoin a person from prosecuting a proceeding for a patent before the Commissioner of Patents. *Griffith v. Dodgson*, 103 App. Div. 542, 93 N. Y. Supp. 155.

44. *Montana Ore-Purchasing Co. v. Butte & Boston Consol. Mining Co.*, 44 App. Div. 136, 60 N. Y. Supp. 684; *Dinsmore v. Neresheimer*, 32 Hun 204; *Stevens v. Central Nat. Bank of Boston*, 52 St. Rep. 894.

45. *Venice v. Woodruff*, 62 N. Y. 462; *Montana Ore-Purchasing Co. v. Butte & Boston Consol. Mining Co.*, 44 App. Div. 136, 60 N. Y. Supp. 684; *Town of Thompson v. Morris*, 11 Abb. N. C. 163; *Coster v. Griswold*, 4 Edw. Ch. 364; *Schuyler v. Pelissier*, 3 Edw. Ch. 191; *Mead v. Merritt*, 2 Paige 402;

reversal of one of such cases by the United States Supreme Court,⁴⁶ the State courts have no longer attempted to assert this power.⁴⁷

H. Proceedings in courts of other states.

The courts of this State have no direct control over proceedings in courts of other States. Indirectly, however, in a case appealing to equity, such proceedings may be affected. When necessary for the adequate protection of the rights of the parties, the courts of this State may enjoin a party over which it has jurisdiction from commencing or prosecuting an action in a foreign State.⁴⁸ It is only in extreme or

Barry v. Mutual Life Ins. Co., 2 T. & C. 15. "I think that no injunction should be granted by state courts restraining the enforcement by parties of a federal judgment where the effect of such injunction is to raise a conflict with the federal court. Neither, probably, can proceedings in the federal courts be enjoined by a state court. But authorities above cited seem to hold that in certain exceptional cases parties to an action in a state court may be enjoined from taking any proceedings under a judgment in a federal court." Stevens v. Central Nat. Bank of Boston, 52 St. Rep. 894.

46. Central Nat. Bank v. Stevens, 169 U. S. 432, reversing Stevens v. Central Nat. Bank, 144 N. Y. 50.

47. Bearslee v. Ingraham, 193 N. Y. 411; Aetna Explosives Co. v. Bassick, 176 App. Div. 577, 193 N. Y. Supp. 917, affirmed 220 N. Y. 767; Clark v. Bankers' Trust Co., 177 App. Div. 627, 164 N. Y. Supp. 544; Susquehanna S. S. Co. v. A. O. Anderson & Co., 195 App. Div. 161, 186 N. Y. Supp. 338; Johnstown Min. Co. v. Morse, 44 Misc. 504, 90 N. Y. Supp. 107; "The issues present in the two actions pending in the United States District Court cannot be litigated in this suit. Where a federal and state court have concurrent jurisdiction 'the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its

duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases.' (Harkrader v. Wadley, 172 U. S. 148, 164; Ex parte Young, 209 id. 123.) The plaintiffs in those actions being citizens of other states have a right to select their forum. Having made their selection and the federal court having acquired jurisdiction, the courts of this state cannot compel them to litigate the issues therein involved in our tribunal, either directly by enjoining the prosecution of the actions in the federal court, or indirectly by restraining an amendment of pleadings, or by assuming jurisdiction of those actions and trying the issues involved therein, as is attempted by the order under review." Aetna Explosives Co. v. Bassick, 176 App. Div. 577, 163 N. Y. Supp. 917, affirmed 220 N. Y. 767.

48. Williams v. Ingersoll, 89 N. Y. 508; Locomobile Co. v. American Bridge Co., 80 App. Div. 44, 80 N. Y. Supp. 288; Vail v. Knapp, 49 Barb. 299; Garrison v. Marie, 7 Civ. Proc. 113, 1 How. Pr. N. S. 348; White v. Caxton Book-Binding Co., 10 Civ. Proc. 146; Clafin v. Hamlin, 62 How. Pr. 284; Pusey v. Bradley, 1 Thomps. & C. 661, 46 How. Pr. 255.

Vexatious suits.—"The general rule is, that the courts of this state will decline to interfere by injunction to

extraordinary cases that the Supreme Court of this State will exercise this power.⁴⁹ If the courts of a foreign State have jurisdiction of the proceedings and the parties, and the matters in controversy can there be determined apparently with justice to the parties, the courts of this State will not interfere.⁵⁰ The courts of this State will not assume jurisdiction of the controversy merely because the convenience of a party will thereby be subserved,⁵¹ or because the rules of evidence are more favorable in this State,⁵² or because a party claims to have a defense to the proceeding in the sister State.⁵³ That the rules of law applicable to

restrain its citizens from proceeding in an action commenced in the courts of a sister state. There are exceptions to this rule, as where it can be shown that the suit sought to be restrained is not brought in good faith, or that it was brought for the purpose of vexing, annoying and harrasing the party seeking the injunction." *White v. Caxton Book-Binding Co.*, 10 Civ. Proc. 146.

Receiver.—The court has jurisdiction *in personam* over a receiver appointed by it in an action to dissolve a domestic corporation, and may restrain the prosecution of an action begun by him in another state. Where an action is brought in this state to determine the title to the stock of an insolvent domestic corporation pledged as collateral to the bonds of another corporation, a receiver of the insolvent corporation appointed by our courts will be restrained from prosecuting an action involving the same question in a foreign jurisdiction where the issues can be decisively disposed of here and all parties having conflicting claims may assert the same and the judgment will be conclusive in the foreign jurisdiction, while the foreign judgment would not be conclusive upon some claimants. *Guaranty Trust Co. v. Edison United Phonograph Co.*, 123 App. Div. 591, 112 N. Y. Supp. 929.

49. *Allison v. Eagle Ins. Co.*, 144 App. Div. 74, 128 N. Y. Supp. 817;

Winfield v. Bacon, 24 Barb. 154; *Vail v. Knapp*, 49 Barb. 299; *Burgess v. Smith*, 2 Barb. Ch. 276; *Clafin v. Hamlin*, 62 How. Pr. 284.

50. *Guggenheim v. Wahl*, 203 N. Y. 390; *Allison v. Eagle Ins. Co.*, 144 App. Div. 74, 128 N. Y. Supp. 817; *Miller v. Myers*, 75 Misc. 297, 135 N. Y. Supp. 73, affirmed, 151 App. Div. 938, 135 N. Y. Supp. 1128; *Walton v. Grand Belt Copper Co.*, 56 Hun 211, 31 St. Rep. 259, 9 N. Y. Supp. 375; *Bennett v. LeRoy*, 5 Abb. Pr. 55, 14 How. Pr. 178, 13 Super. Ct. (6 Duer) 683; *Conkling v. Secor Sewing Mach. Co.*, 55 How. Pr. 269; *Grant v. Quick*, 7 Super. Ct. (5 Sandf.) 612.

Settlement of estate.—The courts of this state will not entertain a suit brought by a legatee to restrain the assignee of a portion of the legacy from collecting the same, where the testator resided in a foreign state where the will was probated, if a proceeding for the settlement of the estate is pending in the foreign probate court, and every question sought to be litigated can be determined in that proceeding. *Allison v. Eagle Ins. Co.*, 144 App. Div. 74, 128 N. Y. Supp. 817.

51. *Edgell v. Clarke*, 19 App. Div. 199, 45 N. Y. Supp. 979.

52. *Edgell v. Clarke*, 19 App. Div. 199, 45 N. Y. Supp. 979.

53. *Miller v. Myers*, 75 Misc. 297, 135 N. Y. Supp. 73, affirmed, 151 App. Div. 938, 135 N. Y. Supp. 1128.

the controversy are different in a sister State, is no ground for restraining a suit in that State.⁵⁴

The courts of this State are more active to avert the consequences which may arise from an action subsequently commenced in another State, than to restrain the continuance of one already pending in that jurisdiction.⁵⁵ If an action is pending in this State in a court having jurisdiction of all of the necessary parties, one of such parties may be restrained from starting a threatened suit in another State which would involve the same controversy.⁵⁶ Or, after the commencement of such an action, its continuance may be restrained.⁵⁷ The fact that the rules of substantive law or that the principles governing the admission of evidence are different in a sister State, is no ground for permitting a litigant to transfer the controversy to such State.⁵⁸

Where both a husband and wife are residents of this State and subject to the jurisdiction of its courts, an injunction may be granted to restrain one of them from claiming a residence in another State and procuring in that State a divorce.⁵⁹

A court of one State may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another State, was obtained by fraud, and, if so, may enjoin the enforcement of it, although its subject-matter is situated in another State.⁶⁰ But the courts of this State will not interfere when a party affected by a

54. *Barrett v. Russell*, 75 Misc. 226, 135 N. Y. Supp. 34.

55. *Webster v. Columbian Nat. L. Ins. Co.*, 131 App. Div. 837, 116 N. Y. Supp. 404, affirmed, 196 N. Y. 523; *Gaunt v. Nemours Trading Corp.*, 194 App. Div. 668, 186 N. Y. Supp. 92.

Independent action.—The proper practice is an independent action in this state for the restraint of the foreign suit, rather than by motion in the action in this state. *Webster v. Columbian Nat. L. Ins. Co.*, 131 App. Div. 837, 116 N. Y. Supp. 404, affirmed, 196 N. Y. 523.

56. *Field v. Holbrook*, 3 Abb. Pr. 377.

57. *Locomotive Co. v. American Bridge Co.*, 80 App. Div. 44, 80 N. Y. Supp. 288; *Webster v. Columbian Nat. L. Ins. Co.*, 131 App. Div. 837, 116 N. Y. Supp. 404, affirmed, 196 N. Y. 523; *Gaunt v. Nemours Trading Corp.*, 194 App. Div. 668, 186 N. Y. Supp. 92; *Kittle v. Kittle*, 8 Daly 72.

58. *Webster v. Columbian Nat. Life Ins. Co.*, 131 App. Div. 837, 116 N. Y. Supp. 404, affirmed, 196 N. Y. 523.

59. *Gwathmey v. Gwathmey*, 116 Misc. 85, 190 N. Y. Supp. 199, affirmed, 201 App. Div. 843, 193 N. Y. Supp. 935; *Forrest v. Forrest*, 2 Edm. Sel. Cas. 180.

60. *Davis v. Cornue*, 151 N. Y. 172.

judgment improperly rendered in another State, makes a direct attack on the judgment in such state.⁶¹

One who is not a party to the action in another jurisdiction will not be injured, in a legal sense, by the decision, and is not in a position to restrain the maintenance of the action.⁶²

I. Proceedings in foreign countries.

Though the exercise of the power is very rare the Supreme Court of this State, in a proper case, has the jurisdiction to restrain a resident party from maintaining a suit in a tribunal of a foreign country. Thus, the courts of this State may restrain a resident from maintaining an action for divorce in a foreign country, the courts of which have not acquired jurisdiction of the parties; and this power will be exercised whenever it is necessary in the interests of justice.⁶³

J. Usurious obligation.

Although section 373 of the General Business Law, superficially read, might sustain a contention that an injunction would be granted to restrain an action at law on a usurious obligation, yet a borrower cannot avail himself of this remedy, if he is in a position to assert all of his rights when sued on the obligation.⁶⁴

K. Obligation settled.

Ordinarily the alleged payment of an obligation does not authorize a court of equity to intervene and enjoin the maintenance of an action thereon.⁶⁵ The debtor has an adequate remedy at law to set up as a defense the payment of

61. *Guggenheim v. Wahl*, 203 N. Y. 390.

62. *Johnstown Mining Co. v. Morse*, 45 Misc. 110, 91 N. Y. Supp. 586. See also, *Guggenheim v. Wahl*, 138 App. Div. 269, 122 N. Y. Supp. 941.

Foreign consul.—An injunction may be granted by a state court to restrain persons from prosecuting a claim before an American consul abroad, where the consul has not jurisdiction of the proceedings instituted before him. *Dainese v. Allen*, 3 Abb. Pr. N. S. 212.

63. *Greenberg v. Greenberg*, 218 App. Div. 104, 218 N. Y. Supp. 87.

64. *Minturn v. Farmers L. & T. Co.*, 3 N. Y. 498.

65. *Fowler v. Palmer*, 62 N. Y. 533; *White v. Duryea*, 81 N. Y. 619; *Gillette Clipping Mach. Co. v. Etting*, 170 App. Div. 185, 155 N. Y. Supp. 989; *Gilliran v. Owens*, 182 App. Div. 580, 169 N. Y. Supp. 958.

Where a note is transferred after maturity it is subject to any defense which might exist if the note were

the debt when he is sued.⁶⁶ The compromise and settlement of an unliquidated obligation is similarly considered.⁶⁷ Yet, if special circumstances exist which render inadequate the defensive remedy, an action in equity may be maintained as an affirmative remedy to restrain action.⁶⁸ Thus, where one is charged with immoral conduct, fraud, dishonesty, and the trial of the issues thereof would cause scandal and injury to one's reputation, if he claims that the charges have been compromised and settled, he may have a determination of that issue without the publicity attending the trial of the main issues. In other words, he may restrain the action at law until a court of equity has determined whether the cause of action has been satisfied.⁶⁹

still in the hands of the original payee. As the maker of the note has the defense of payment, which can be asserted in an action on the note, he is not entitled to maintain a suit for an injunction to restrain the holder of the note from prosecuting a legal action thereon. *Gillaran v. Owens*, 182 App. Div. 580, 169 N. Y. Supp. 958.

Where an agreement to settle an action made on the eve of trial was never carried out and the cause was restored to the calendar on the plaintiff's motion and the defendants took no appeal from the order, they are not entitled to a stay of the plaintiff's legal action until the determination of a suit in equity brought by them for the specific performance of the agreement to settle the prior action. *Rubin v. Siegel*, 181 App. Div. 181, 168 N. Y. Supp. 744.

Surety.—In the early cases, it was held that a surety who had been discharged of liability to the obligee, could maintain a suit in equity, although he might have interposed the defense of discharge in an action by the obligee. *Sailly v. Elmore*, 2 Paige 497; *Miller v. McCan*, 7 Paige 451.

⁶⁶ *Gillette Clipping Mach. Co. v. Etting*, 170 App. Div. 185, 155 N. Y. Supp. 989; *Gillaran v. Owens*, 182 App. Div. 580, 169 N. Y. Supp. 958.

⁶⁷ *Burke v. Burke*, 212 N. Y. 303.

⁶⁸ *Cantoni v. Forster*, 12 Misc. 376, 67 St. Rep. 345, 33 N. Y. Supp. 645, affirmed without opinion, 146 N. Y. 405.

⁶⁹ *Bomeisler v. Forster*, 154 N. Y. 229. "The difference to the plaintiff between a trial of the action at law, in which all the scandalous matters would be made public and his reputation more or less affected, according as credence might be given to the statements and charges of the plaintiff therein, and a trial of the action in equity, where the issue would be confined to the question of whether there had been a release and settlement of all claims against him, which formed the basis of the complaint in the pending action, and an agreement not to sue further upon them, is quite perceptible and substantial. The fact of a release would not prevent, in the former case, the ventilation of all the matters of complaint, real or fabricated; whereas, in the latter case, if it should be found that it was validly made and that there was an agreement not to harass by suits upon claims which had been settled and released, this plaintiff would be spared a public discussion of charges which the settlement between him and the defendant had disposed of. The specific perform-

One alleging that a lien has been discharged by a tender of the amount thereof, must, in order to restrain an action to enforce the lien, keep the tender good. The maxim—he, who seeks equity, must do equity—is applied.⁷⁰

L. Counterclaim or set-off.

The early procedure in this State was not as lenient in the interposition of counterclaims as is the present practice code. If justice would fail because of the inability to present a counterclaim or equitable set-off, equity assumed jurisdiction of the controversy.⁷¹ Recourse to equity is no longer necessary, except possibly in some cases of unusual circumstances.⁷²

M. Surrogate's courts.

Under section 40 of the Surrogate's Court Act, a surrogate has jurisdiction to "determine all questions, legal or

ance of the contract, which is found to have been made by the defendant with the plaintiff, seems essential to justice; if the latter is to be assured of the benefits of the former's agreement with him." *Bomeister v. Forster*, 154 N. Y. 229.

70. *Tuthill v. Morris*, 81 N. Y. 94. "A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage, and the costs and interest, at least up to the time of the tender. There can be no pretense of any equity in depriving the creditor of his security for his entire debt, by way of penalty for having declined to receive payment when offered. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing, and to entitle him to this relief, he should have kept his tender good from the time it was made. If any further advantage is gained by a tender of the mortgage debt, it must rest on strict legal rather than on equitable principles. The circumstance that a security has become or is invalid in

law, and could not be enforced, even in equity, does not entitle a party to come into a court of equity, and have it decreed to be surrendered or extinguished, without paying the amount equitably owing thereon." *Tuthill v. Morris*, 81 N. Y. 94.

71. *Mel v. Holbrook*, 4 Edw. 539.

72. *Sherwood v. Fincke Co., Inc.*, 196 App. Div. 97, 187 N. Y. Supp. 755.

Offset of judgments.—A plaintiff, having uncollectible judgments against an insolvent defendant and suing to offset the same against a judgment for costs awarded in another action brought by the defendant against him, should be granted an injunction *pendente lite*, restraining the defendant and other persons interested in the costs from collecting the same, as otherwise he will be deprived of all the benefit of his judgments while being compelled to pay costs to the defendant. *Title Guarantee Co. v. Brown*, 141 App. Div. 14, 125 N. Y. Supp. 780.

Action in local court.—An action in a District Court will not be enjoined on the ground that the defendant has a counterclaim upon a prior indebted-

equitable," arising between any and all of the parties to any proceeding in his court. This grant of equitable power, however, is of comparatively recent origin. Prior to 1914, a surrogate was without equitable jurisdiction.⁷³ Prior to that time, if a proceeding in a surrogate's court involved an equitable right which could not be determined by the surrogate, the proper practice was the commencement of an action in equity in the Supreme Court for the determination of the right, and a stay of the proceedings in the surrogate's court until the determination of the action.⁷⁴ On the other hand, equity would refuse to intervene, if the proceeding was one within the exclusive power of the surrogate's court, and it appeared that that court could determine the entire controversy.⁷⁵ The general language of section 40 of the Surrogate's Court Act does not transform a surrogate's court into a court of equity. There may remain cases where a surrogate's court is powerless to pass upon all of the equitable rights of the parties, and in such cases the Supreme Court may intervene if necessary for the administration of justice.⁷⁶

In matters relating to testamentary trusts, as a general rule, courts of equity and surrogate's courts have concurrent jurisdiction. If an action relating to the trust is pending in the Supreme Court, an order may properly be granted by that court enjoining a party from prosecuting in a surrogate's court a proceeding affecting the controversy.⁷⁷ On

ness exceeding the jurisdiction of the court, where he knew at the time of making the contract sued upon that it could be enforced in such a court and that his counterclaim could not be introduced therein, and made no provision in the contract for its payment. *Michael v. Kronthal*, 13 Misc. 428, 34 N. Y. Supp. 681.

73. *Hastrich v. Pilcher*, 171 App. Div. 470, 157 N. Y. Supp. 613.

74. *Schlesinger v. Schlesinger*, 157 App. Div. 633, 142 N. Y. Supp. 729; *Metropolitan Trust Co. v. Stallo*, 166 App. Div. 629, 152 N. Y. Supp. 183; *Hastrich v. Pilcher*, 171 App. Div. 470, 157 N. Y. Supp. 613; *Pettigrew v. Foshay*, 12 Hun 483; *VanSinderen v. Lawrence*, 50 Hun 272, 20 St. Rep. 72,

3 N. Y. Supp. 25; *Cobb v. Hanford*, 88 Hun 21, 68 St. Rep. 294, 34 N. Y. Supp. 511, 2 Ann. Cas. 182.

75. *Paxton v. Patterson*, 26 Abb. N. C. 389, 35 St. Rep. 479, 12 N. Y. Supp. 563; *Becker v. Hager*, 3 How. Pr. 68; *Lawrence v. Parsons*, 27 How. Pr. 26; *Wright v. Fleming*, 12 Hun 469, affirmed, 76 N. Y. 517. See also, *Hotchkiss v. Hotchkiss*, 16 Civ. Proc. R. 129, 2 N. Y. Supp. 825, 19 St. Rep. 767.

76. *Rochester Trust & S. D. Co. v. Brown*, 116 Misc. 184, 189 N. Y. Supp. 678.

77. *Gould v. Gould*, 118 Misc. 576, 195 N. Y. Supp. 113, affirmed, 203 App. Div. 817, 197 N. Y. Supp. 524.

the other hand, if the proceeding in the surrogate's court has been pending for some time, the Supreme Court may refuse to restrain its continuance.⁷⁸

N. Inferior local courts.

Inferior local courts have not, and on account of the restriction in section 18 of Article VI of the State Constitution cannot be, invested with equity jurisdiction. Hence, if one sued in such a court has an equitable defense which the court cannot determine, an action may be maintained in the Supreme Court for the determination of the equitable rights of the parties; and pending the decision on the equitable issues, the prosecution of the action in the local court may be restrained.⁷⁹ A court of equity will not assume jurisdiction, if a party can secure relief in the local court;⁸⁰ nor is resort to equity to be used as a substitute for an appeal from the local court.⁸¹

O. Ecclesiastical courts.

The only ground upon which the court can exercise any jurisdiction, to restrain a bishop from prosecuting a sentence of an ecclesiastical tribunal against a clergyman, by pronouncing judgment of displacement from the ministry, is that the threatened action of the defendant may effect the civil rights of the plaintiff, for the protection of which he has a proper recourse to the civil courts, viz., exemption

78. *Hamilton v. Cutting*, 60 App. Div. 293, 70 N. Y. Supp. 118.

79. *Reimpst v. Wekher*, 131 App. Div. 824, 116 N. Y. Supp. 218; *Kaufman v. Schwartz*, 174 App. Div. 239, 160 N. Y. Supp. 1056; *New York v. Conover*, 5 Abb. Pr. 252.

Usurious chattel mortgage.—A plaintiff who has brought suit in the Supreme Court to procure the cancellation of a chattel mortgage on the ground that it was given to secure a usurious loan which has matured, is entitled to an injunction restraining the defendant from proceeding to collect the loan, or from interfering with the mortgaged property, pending the determination of the action, even though when the defendant brought a

subsequent suit in the Municipal Court to foreclose the mortgage, the plaintiff, as defendant in the second action, set up the same defense of usury. The plaintiff is entitled to the injunction as he was first to sue, and also because his remedy in the Municipal Court is not adequate in that the defendant in the Municipal Court action cannot prevent the plaintiff therein from taking possession of the property. *Kaufman v. Schwartz*, 174 App. Div. 239, 160 N. Y. Supp. 1056.

80. *LaFemina v. Arsene*, 69 App. Div. 285, 74 N. Y. Supp. 749.

81. *Wordsworth v. Lyon*, 5 How. Pr. 463, Code R. N. S. 163; *Hollister v. Sinclair*, 89 Hun 421, 69 St. Rep. 793, 35 N. Y. Supp. 407.

from taxation, and the performance of certain civil duties. Conceding that this is a sufficient ground for the action of the court, the only cognizance which it will take of the case is, to inquire whether there is a want of jurisdiction in the defendant to do the act which is sought to be restrained. The court will not review the exercise of any discretion on the part of the bishop; nor inquire whether his judgment, or that of the subordinate ecclesiastical tribunal, is justified by the truth of the case. It will only inquire whether the bishop has the power to act; not whether he is acting rightly. Therefore, the court will take no cognizance of matters which relate to the mode of proceeding, and not to the right to proceed.⁸²

P. Condemnation proceedings.

An action in equity cannot be maintained to restrain the prosecution of condemnation proceedings, when the alleged claims of the plaintiff can be determined in the proceedings.⁸³ A court of equity, however, may intervene if the condemnation does not afford an adequate remedy for the protection of one's rights.⁸⁴

Q. Summary proceedings.

Subdivision 2 of section 1446 of the Civil Practice Act specifically recognizes the right of a tenant to maintain an action in equity to restrain the prosecution of summary proceedings or the execution of a warrant of dispossession.⁸⁵ The judicial officers before whom such proceedings are instituted do not have equity powers, and if there is some reason founded on equitable grounds why the tenant should not be removed from the premises, and the question cannot be determined in the proceeding, the tenant may have relief in equity.⁸⁶ In the early history of the summary remedy, equi-

⁸². *Walker v. Wainwright*, 16 Barb. 486.

⁸³. *Kip v. New York & Harlem R. Co.*, 6 Hun 24, affirmed, 67 N. Y. 227.

⁸⁴. *Bunyan v. Palisades Interstate Park Comrs.* 167 App. Div. 457, 153 N. Y. Supp. 622.

⁸⁵. See, *Fiero on Particular Actions and Proceedings*, vol. 3, page 3225.

⁸⁶. *Becker v. Church*, 115 N. Y. 563;

Potter v. Potter, 59 App. Div. 140, 69 N. Y. Supp. 183; *Loughman v. Lillien-dahl*, 195 App. Div. 867, 187 N. Y. Supp. 401; *Rodgers v. Earle*, 5 Misc. 164, 24 N. Y. Supp. 913; *Noble v. McGurk*, 16 Misc. 461, 39 N. Y. Supp. 921; *Weber v. Rogers*, 41 Misc. 662, 85 N. Y. Supp. 232; *Horton v. Roy*, 116 Misc. 707, 190 N. Y. Supp. 454; *Vallotton v. Seignett*, 2 Abb. Pr. 121;

table defenses could not be heard, but now section 1425 of the Practice Act in terms authorizes the interposition of equitable defenses.⁸⁷ An independent action in equity will not be heard, if the tenant can be adequately protected in the summary proceedings.⁸⁸ A legal defense to the proceedings is no ground for intervention by equity.⁸⁹

If the tenant seeks affirmative equitable relief, as for the specific performance, the rescission or the reformation of the agreement between the parties, in his action for that purpose, an injunction may be granted to restrain the maintenance of summary proceedings against him.⁹⁰ But, if he is not seeking affirmative relief, equities of this nature may be interposed as a defense, and an injunction is unnecessary.⁹¹ It is only where the tenant is entitled to something beyond a mere dismissal of the petition in the proceedings, that equity interposes and asserts its power.⁹²

An action in equity is authorized in some cases to restrain the execution of a warrant of dispossession, though the remedy is available only in extreme and clear cases.⁹³ Fraud, collusion, undue advantage, or want of jurisdiction

Chadwick v. Spargur, 1 Civ. Proc. (McCarthy) 422; *Gilman v. Prentice*, 11 Civ. Proc. 310, 3 St. Rep. 544; *Landon v. Supervisors of Schenectady*, 24 Hun 75; *Crawford v. Kastner*, 26 Hun 440, 63 How. Pr. 90; *Greimel v. O'Connor*, 119 N. Y. Supp. 660, modified on other grounds, 133 App. Div. 887, 117 N. Y. Supp. 629; *Vanderlofsky v. Herman*, 184 N. Y. Supp. 304.

^{87.} *Potter v. Potter*, 59 App. Div. 140, 69 N. Y. Supp. 183; *Horton v. Roy*, 116 Misc. 707, 190 N. Y. Supp. 454.

^{88.} *Potter v. Potter*, 59 App. Div. 140, 69 N. Y. Supp. 183; *Natkins v. Wetterer*, 76 App. Div. 93, 78 N. Y. Supp. 713; *Huylers v. Broadway-John Street Corp.*, 195 App. Div. 410, 186 N. Y. Supp. 290; *Noble v. McGurk*, 16 Misc. 461, 39 N. Y. Supp. 921; *N. Y. City Baptist Mission Soc. v. Potter*, 20 Misc. 191, 44 N. Y. Supp. 1051; *Weber v. Rogers*, 41 Misc. 662, 35 N. Y. Supp. 232; *Chadwick v. Spargur*, 1 Civ. Proc. (McCarthy) 422; *Bliss v.*

Murray, 17 Civ. Proc. R. 64, 7 N. Y. Supp. 917; *Rapp v. Williams*, 1 Hun 716, 4 Thoms. & C. 174; *Vanderlofsky v. Herman*, 184 N. Y. Supp. 304; *Zuzel v. Kurek*, 190 N. Y. Supp. 642.

^{89.} *Kienle v. Gretsch Realty Co.*, 133 App. Div. 391, 117 N. Y. Supp. 500.

^{90.} *Becker v. Church*, 115 N. Y. 563; *Loughman v. Lilliendahl*, 195 App. Div. 967, 187 N. Y. Supp. 401; *Rodgers v. Earle*, 5 Misc. 164, 24 N. Y. Supp. 913; *Murray v. Sweasy*, 31 Misc. 603, 66 N. Y. Supp. 72; *Montant v. Moore*, 61 Misc. 45, 113 N. Y. Supp. 43; *Horton v. Roy*, 116 Misc. 707, 190 N. Y. Supp. 454.

^{91.} *Zuzel v. Kurek*, 190 N. Y. Supp. 642.

^{92.} *Horton v. Roy*, 116 Misc. 707, 190 N. Y. Supp. 454.

^{93.} *Campbell v. Babcock*, 26 Abb. N. C. 35, 13 N. Y. Supp. 843; *Knox v. McDonald*, 25 Hun 268. See, *Fiero on Particular Actions and Proceedings*, vol. 3, page 3227.

are grounds which have been sustained for such relief.⁹⁴ Equitable relief will not be granted if the tenant has an adequate remedy at law for any damages he may sustain by reason of the eviction.⁹⁵ If the justice has erred as to decisions within his jurisdiction, the remedy is by appeal, not by an application to the equitable power of the court.⁹⁶

R. Ejectment.

In the early practice an equitable defense could not be interposed in an action to recover real property, and hence a defendant necessarily invoked equitable jurisdiction for the protection of his equitable rights. The necessity for an independent action in equity to restrain an ejectment action until the determination of the equitable rights of the parties, has long passed. Section 262 of the Civil Practice Act permits the interposition of an equitable defense or counterclaim. Equity will not restrain the prosecution of an ejectment action, unless by reason of special circumstances, the rights of the parties cannot be adequately protected without the intervention of equity.⁹⁷

S. Enforcement of arbitration.

If an award of arbitrators was procured by improper means, the remedy is an application for an order under section 1457 of the Civil Practice Act vacating the award. There is no necessity for the interference of a court of

94. *Sherman v. Wright*, 49 N. Y. 227; *Kaminsky v. Klasko Finance Corp.*, 191 App. Div. 412, 181 N. Y. Supp. 563; *Marks v. Wilson*, 11 Abb. Pr. 87; *McIntyre v. Hernandez*, 7 Abb. Pr. N. S. 214, 39 How. Pr. 121; *Chadwick v. Spargur*, 1 Civ. Proc. R. 422; *Broadwell v. Holcomb*, 4 Civ. Proc. 159, 65 How. Pr. 502; *Kiernan v. Reming*, 7 Civ. Proc. 311, 2 How. Pr. N. S. 89; *Cahill v. Wyand*, 22 Civ. Proc. R. 271; *Cure v. Crawford*, 2 Edm. Sel. Cas. 233, 5 How. Pr. 293; 1 Code R. N. S. 18; *Bokee v. Hamersley*, 16 How. Pr. 461; *Schneider v. Leizman*, 57 Hun 561, 33 St. Rep. 351, 11 N. Y. Supp. 434; *Griffith v. Brown*, 26 Super. Ct. (3 Rob.) 627, 28 How. Pr. 4.

95. *Smith v. Smith*, 174 N. Y. Supp. 747.

96. *Natkins v. Wetterer*, 76 App. Div. 93, 78 N. Y. Supp. 713; *Kaminsky v. Klasko Finance Corp.*, 191 App. Div. 412, 181 N. Y. Supp. 563; *Seeback v. McDonald*, 11 Abb. Pr. 95, 21 How. Pr. 224; *McIntyre v. Hernandez*, 7 Abb. Pr. (N. S.) 214, 39 How. Pr. 121; *Duigan v. Hogan*, 14 Super. Ct. (1 Bosw.) 645, 16 How. Pr. 164; *Koster v. VanSchaick*, 2 Civ. Proc. R. (Browne) 336; *Bliss v. Murray*, 17 Civ. Proc. R. 64, 7 N. Y. Supp. 917; *Jackson v. Stiles*, 61 How. Pr. 261.

97. *Siemon v. Schurck*, 29 N. Y. 598; *Montant v. Moore*, 61 Misc. 45, 113 N. Y. Supp. 43; *Sieman v. Austin*, 33

equity in a case covered by section 1457. The application of this section, however, is limited to statutory arbitrations, not to common law arbitrations; and equity interposes its relief, in some cases, as to the latter class of arbitrations.⁹⁸ The enforcement of an award in a common law arbitration was by an action thereon; and, if the irregularity in the proceedings was such as could be urged as a defense in such an action, equity took the position that the aggrieved party had an adequate remedy at law and would extend no relief.⁹⁹

Prior to the adoption of the Arbitration Law in 1920, either party was at liberty to revoke the submission or terminate the arbitration at any time before the award was made.¹ Equity would not restrain a violation of the agreement to submit to arbitration, and permitted either party to maintain an action in the courts.² But the present Arbitration Law makes irrevocable agreements of submission or agreements to submit, and authorizes an order staying proceedings brought in violation of the agreements.

T. Enforcement of judgment.

In a proper case, where apparently there is no adequate remedy at law, equity will assume jurisdiction of an action to declare the invalidity of a judgment, and to restrain the enforcement thereof.³ Ordinarily, this remedy is available only when the infirmity of the judgment is to be established by evidence *dehors* the record. Injunctive relief may be granted where a confession of judgment was based on an immoral consideration or one against public policy.⁴ The enforcement of a judgment procured by fraud may be restrained.⁵ An agreement, based on a good consideration, not to enforce a judgment, may be enforced in equity.⁶ Equitable relief will not be granted where there is an ade-

Barb. 9; Willard v. Bullard, 18 St. Rep. 794, 3 N. Y. Supp. 683.

98. See, Fiero on Particular Actions and Proceedings, vol. 1, page 68.

99. Stover v. Cogswell, 57 Barb. 448; Snediker v. Pearson, 2 Barb. Ch. 107; Woodworth v. VanBuskerk, 1 Johns. Ch. 432.

1. See, Fiero on Particular Actions and Proceedings, vol. 1, page 77.

2. Rutherford v. Manley, 59 Hun 440, 13 N. Y. Supp. 728.

3. Schley v. Andrews, 225 N. Y. 110; Patterson v. Naehr, 16 Civ. Proc. R. 449, 6 N. Y. Supp. 513.

4. Schley v. Andrews, 225 N. Y. 110.

5. Moser v. Polhamus, 4 Abb. Pr. N. S. 442.

6. Oppen v. Hirsh, 33 Misc. 560, 68 N. Y. Supp. 879; Frost v. Myrick, 1 Barb. 362.

Judgment paid.—See Lansing v. Eddy, 1 Johns. Ch. 49.

quate remedy at law,⁷ as where a party can take an appeal or otherwise secure a review of the judgment,⁸ or where the nullity of the judgment appears upon the face of the proceedings so that a party can resist when enforcement is sought.⁹

Ordinarily an action in equity will not lie to restrain an officer from the enforcement of an execution, the remedy at law for damages being considered adequate.¹⁰ If an officer has levied upon goods not owned by the judgment debtor, the remedy is by action at law against the officer, not an action in equity to restrain a sale.¹¹ But, if the process is regular on its face and therefore a protection to the officer, and it appears that the judgment creditor is insolvent, the remedy at law may be so inadequate that equitable aid may be invoked.¹² Where the holder of the judgment is insolvent, the question whether a levy on personal property was excessive may be determined in an action to restrain the proceedings.¹³

When the title to real estate is involved, a court of equity may assume jurisdiction on the ground of avoiding a cloud on title.¹⁴ Thus, if it is sought to sell under an execution real estate which the owner claims to be exempt as having been purchased with pension moneys, an action of injunction is an appropriate remedy.¹⁵ If the judgment debtor's name is incorrectly spelled in the judgment so that a purchaser of the premises was not charged with notice of the lien, a sale of the premises under the judgment may be restrained.¹⁶

U. Use of evidence improperly secured.

Equity may, in a proper case, entertain jurisdiction of a suit to enjoin the introduction, in an action at law, of evidence obtained by fraud and duress.¹⁷ Thus, where a hus-

7. *Hyatt v. Bates*, 40 N. Y. 164; *Wright v. Fleming*, 7 Hun 608, reversed on other grounds, 71 N. Y. 612.

8. *Hyatt v. Bates*, 40 N. Y. 164; *Wright v. Fleming*, 7 Hun 608, reversed on other grounds, 71 N. Y. 612.

9. *Hyatt v. Bates*, 40 N. Y. 164.

10. *Chittenden v. Davidson*, 52 Super. Ct. (20 J. & S.) 421.

11. *Drewson v. American Surety Co.*, 22 Week. Dig. 562.

12. *Welz v. Niles*, 3 Daly 172.

13. *Sickles v. Combs*, 10 Misc. 551, 65 St. Rep. 260, 32 N. Y. Supp. 181; *Funk v. Brooklyn Glass & Mfg. Co.*, 25 Misc. 91, 53 N. Y. Supp. 1086.

14. *Pettit v. Shepherd*, 5 Paige 493.

15. *Buffum v. Forster*, 77 Hun 27, 59 St. Rep. 833, 28 N. Y. Supp. 285.

16. *Stark v. Weisner*, 126 Misc. 620, 214 N. Y. Supp. 292.

17. *Matthews v. Carman*, 122 App. Div. 582, 107 N. Y. Supp. 694.

band has procured from his wife, by fraud and duress, a confession in writing that she has committed adultery, which he proposes to use in an action brought by him for divorce, it has been held that a court of equity may interfere and enjoin the use of the confession in this way.¹⁸ At the time that holding was made, the wife was an incompetent witness to show the fraud and duress. Relief of this character would not be granted, if the objections to the use of the evidence can be shown when it is introduced in evidence.

V. Parties.

Ordinarily only the parties to action sought to be restrained, are made parties to the suit for an injunction and affected thereby.¹⁹ An attorney will not be enjoined, unless something more is alleged against him than the protection of his client's rights.²⁰ A landlord is not entitled to an injunction to restrain summary proceedings instituted against his tenants, by another person claiming to be the owner of the lease of the same premises, where the landlord is not made a party to such summary proceedings.²¹ One who is not a party to the summary proceedings cannot obtain an injunction merely upon the allegation that he is in danger of having his possession disturbed.²²

ARTICLE VI.

ENFORCEMENT OF PENAL LAWS; ORDINANCES.

A. Restraint of officials from enforcing laws.

1. In general.

It is frequently declared as a general rule that equity will not interfere to prevent the enforcement of the criminal law.²³ There are well established limitations to the

18. *Callender v. Callender*, 53 How. Pr. 364.

19. *Waller v. Harris*, 7 Paige 167, affirmed, 20 Wend. 555.

20. *New York v. Conover*, 5 Abb. Pr. 252.

21. *Marry v. James*, 2 Daly 437, 37 How. Pr. 52.

22. *Aaron v. Baum*, 30 Super. Ct. (7 Rob.) 340, 4 Abb. Pr. N. S. 65, 37 How. Pr. 237.

23. *Davis v. American Soc., etc.*, 75 N. Y. 362; *Delaney v. Flood*, 183 N. Y. 323; *Biddles, Inc. v. Enright*, 239 N. Y. 354; *Coykendall v. Hood*, 36 App. Div. 558, 55 N. Y. Supp. 718; *Burns v. McAdoo*, 113 App. Div. 165, 99 N. Y. Supp. 51; *Eden Musee American Co., Ltd. v. Bingham*, 125 App. Div. 780, 110 N. Y. Supp. 210; *Symphony Theater Co. v. Ely*, 187 App. Div. 757, 176 N. Y. Supp. 52; *Alexander v. En-*

general rule, as in the case of unwarranted continuous trespasses by police officers. But the rule is steadily maintained that equity will not restrain the public authorities from making an arrest or prosecuting one for a crime, merely because innocence is asserted.²⁴ A court of equity is not to be used as a substitute for a criminal court in the trial of offenders or determination of guilt.²⁵ If one is arrested

right, 211 App. Div. 146, 206 N. Y. Supp. 785; *Paulding v. Lane*, 55 Misc. 37, 104 N. Y. Supp. 1051; *Ontario Field Club v. McAdoo*, 56 Misc. 285, 107 N. Y. Supp. 295; *Moore v. Owen*, 58 Misc. 332, 109 N. Y. Supp. 585; *Cohen v. New York City Health Dept.*, 61 Misc. 124, 113 N. Y. Supp. 88; *Colby v. Bingham*, 62 Misc. 396, 116 N. Y. Supp. 705; *Greater Newburgh Amusement Co. v. Sayer*, 81 Misc. 307, 142 N. Y. Supp. 69; *Sociological Research Film Corp. v. New York*, 83 Misc. 605, 145 N. Y. Supp. 492; *Klinger v. Ryan*, 91 Misc. 71, 153 N. Y. Supp. 737; *Fuscaro v. McKennell*, 120 Misc. 434, 198 N. Y. Supp. 719; *Dibble v. Jones*, 130 Misc. 357, 223 N. Y. Supp. 830; *Hodges v. Perine*, 24 Hun 516; *Municipal Tel. Co. v. McCreary*, 77 N. Y. Supp. 409.

Indictment.—Equity will not enjoin the prosecution of an indictment, although the accused claims that the statute under which the indictment was found is unconstitutional. *Buffalo Gravel Corp. v. Moore*, 234 N. Y. 542.

24. *Stevens v. McAdoo*, 112 App. Div. 458, 98 N. Y. Supp. 553; *Burns v. McAdoo*, 113 App. Div. 165, 89 N. Y. Supp. 51; *Eden Musee American Co. v. Bingham*, 125 App. Div. 780, 110 N. Y. Supp. 210; *Suesskind v. Bingham*, 125 App. Div. 787, 110 N. Y. Supp. 213; *Kenny v. Martin*, 11 Misc. 651, 32 N. Y. Supp. 1087; *Fox v. Butler*, 60 Misc. 484, 113 N. Y. Supp. 846; *Colby v. Bingham*, 62 Misc. 396, 116 N. Y. Supp. 705; *Yorkville Amusement Co. v. Bingham*, 64 Misc. 636, 118 N. Y. Supp. 753; *Klinger v. Ryan*, 91 Misc. 71, 153 N. Y. Supp.

937; *Burch v. Cavanaugh*, 12 Abb. Pr. N. S. 410; *Stage Horse Cases*, 15 Abb. Pr. N. S. 51; *Murphy v. New York Bd. of Police*, 11 Abb. N. Cas. 337, 63 How. Pr. 396; *Fincke v. Police Commissioners*, 66 How. Pr. 318; *Kremer v. Police Department of New York*, 53 Super. Ct. (21 J. & S.) 492.

25. *Davis v. American Soc., etc.*, 75 N. Y. 362; *Biddles, Inc. v. Enright*, 239 N. Y. 354; *Shepard v. Bingham*, 125 App. Div. 784, 110 N. Y. Supp. 217; *Municipal Tel. Co. v. McCreary*, 77 N. Y. Supp. 409; *Kremer v. Police Department of New York*, 53 Super. Ct. (21 J. & S.) 492. "The only question for contestation was whether, as matter of fact, they were guilty or innocent of such violation; and the determination of that question could not, by such an action as this, be drawn by a court of equity. Whether a person accused of a crime be guilty or innocent, is to be determined in a common law court by a jury; and the people, as well as the accused, have the right to have it thus determined. If this action could be maintained in this case, then it could in every case of a person accused of a crime, where the same serious consequences would follow an arrest; and the trial of offenders, in the constitutional mode prescribed by law, could forever be prohibited. A person threatened with arrest for keeping a bawdy house, or for violating the excise laws, or even for the crime of murder, upon the allegation of his innocence of the crime charged and of the irreparable mischief which would follow his arrest, could always draw the question of his

or about to be arrested illegally, he has a remedy by *habeas corpus*, or by an action at law for damages for false imprisonment or malicious prosecution.²⁶ Or for malicious acts of oppression committed by a police officer, a criminal prosecution may be inaugurated under section 854 of the Penal Law, or damages may be recovered.²⁷ There is no remedy in equity for injury to one's reputation which follows an unjustifiable accusation of crime.

2. Trespass by police officers.

While recognizing the rule that equity will not interfere with the enforcement of the criminal law, trespasses by police officers which are of a continuous nature, causing irreparable damage and for which there is no adequate remedy at law, may be prevented.²⁸ It may interfere to prevent the police from doing criminal acts under the guise

guilt or innocence from trial in the proper forum. An innocent person, upon an accusation of crime, may be arrested and ruined in his character and property, and the damage he thus sustains is *damnum absque injuria*, unless the case is such that he can maintain an action for malicious prosecution or false imprisonment. He is exposed to the risks of such damage by being a member of an organized society and his compensation for such risk may be found in the general welfare which society is organized to promote." *Davis v. American Soc.*, 75 N. Y. 362.

26. *Stevens v. McAdoo*, 112 App. Div. 458, 98 N. Y. Supp. 553; *Murphy v. New York Bd. of Police*, 11 Abb. N. Cas. 337, 63 How. Pr. 396; *Finckle v. N. Y. Police Comrs.*, 66 How. Pr. 318; *Chadwick Park Athletic Club v. Peasley*, 142 N. Y. Supp. 586, affirmed, 161 App. Div. 907, 145 N. Y. Supp. 1117.

27. *Delaney v. Flood*, 183 N. Y. 323; *Stevens v. McAdoo*, 112 App. Div. 458, 98 N. Y. Supp. 553; *Kenny v. Martin*, 11 Misc. 651, 32 N. Y. Supp. 1087; *Moore v. Owen*, 53 Misc. 332, 109 N. Y. Supp. 585; *Klinger v. Ryan*, 91 Misc. 71, 153 N. Y. Supp. 937, 33 N.

Y. Crim. Rep. 382; *Sterman v. Kennedy*, 15 Abb. Pr. 201.

28. *Hale v. Burns*, 101 App. Div. 101, 91 N. Y. Supp. 929; *Burns v. McAdoo*, 113 App. Div. 165, 99 N. Y. Supp. 51; *McGorie v. McAdoo*, 113 App. Div. 271, 99 N. Y. Supp. 47; *Hagan v. McAdoo*, 113 App. Div. 506, 99 N. Y. Supp. 255; *Suesskind v. Bingham*, 125 App. Div. 787, 110 N. Y. Supp. 213; *Hale v. Burns*, 44 Misc. 1, 89 N. Y. Supp. 711, affirmed, 101 App. Div. 101, 91 N. Y. Supp. 929; *Hertz v. McDermott*, 45 Misc. 28, 90 N. Y. Supp. 803; *Craushaw v. McAdoo*, 47 Misc. 420, 94 N. Y. Supp. 386; *Ulster Square Dealer v. Fowler*, 58 Misc. 325, 111 N. Y. Supp. 16; *Fairmont Athletic Club v. Bingham*, 61 Misc. 419, 113 N. Y. Supp. 905; *Colby v. Bingham*, 62 Misc. 396, 116 N. Y. Supp. 705; *Manhattan Iron Works Co. v. French*, 12 Abb. N. C. 446; *Stage Horse Cases*, 15 Abb. Pr. N. S. 51; *Thompson v. McClellan*, 118 N. Y. Supp. 114.

When relief granted.—"It is, therefore, in my opinion, upon grounds of public policy and in the interests of law and order as well as for the protection of sacred individual rights guaranteed by the constitution, for

or pretense of enforcing the criminal law.²⁹ The power possessed by a court of equity to restrain continued trespass may be exercised against police officers when not engaged in administering or enforcing the criminal law according to the methods and procedure of that law. Police officers who go outside legitimate procedure and violate individual rights of person or property are common trespassers and law breakers. Hence, when police officers continue to trespass upon premises where a legitimate business is carried on, to its irreparable damage, and make no claim that anything illegal occurs on the premises, but merely answer that they "suspect" the place without justifying the suspicion, equity will enjoin them from continuing the trespass.³⁰ Thus equity may enjoin any attempts of the public authorities to suppress the publication of a newspaper, although it may

which there is no other adequate remedy, advisable that in a proper case an injunction should issue to enjoin a malicious or unlawful trespass by police officers which they threaten to continue. Of course, the courts may not and will not interfere to prevent arrests or the execution and enforcement of the criminal law, and so long as the police authorities keep within their proper spheres and lines of duty, they cannot be and will not be embarrassed by the courts. It is only in those cases where the police officers are acting without authority and are either ignorantly, willfully or maliciously committing or threatening to commit illegal acts against the rights of a citizen to his irreparable damage, for which there is no other adequate remedy, that an injunction should ever be issued. When, however, the courts are appealed to by a law abiding citizen, or one entitled to the rights of a citizen conducting a lawful business which is invaded by the police who persist in remaining indefinitely, and show no justification therefor, as in this case an injunction may safely be issued, and there is little danger that the precedent will render it difficult for the police officers to enforce the

law and to perform their full duties under the law. A court of equity should not undertake to determine upon conflicting evidence whether or not a crime has been committed or a business is unlawful; but I see no impropriety in enjoining an unlawful trespass by the police, which is threatened to be continuous in its nature and will do irreparable damage, where the evidence is undisputed that the law is not being violated and no unlawful business is being conducted on the premises. This is a well-settled ground of equity jurisdiction as to trespasses of individuals, and when the trespass by police officers is clearly unlawful and will produce irreparable damage, I see no good reason why it should not be exercised as to them." *Burns v. McAdoo*, 113 App. Div. 165, 99 N. Y. Supp. 51.

Theatres.—Equity will not restrain the police officers in the supervision of shows to prevent indecent exhibitions. *Edwards v. McClellan*, 118 N. Y. Supp. 181.

29. *St. Malachy's Home v. Hylan*, 121 Misc. 344, 200 N. Y. Supp. 856.

30. *Hagan v. McAdoo*, 113 App. Div. 506, 99 N. Y. Supp. 255.

contain libellous matter.³¹ Or, if the police threaten to interfere with the interstate commerce business of an express company, an injunction may properly be granted.³²

The question usually arises when a place suspected of criminal operations is under the surveillance of the police. In these cases much depends upon the good faith of the authorities, for equity hesitates to embarrass the officers of the law, unless their acts are clearly unreasonable.³³ Not only may the police have the power to watch a place which they have reasonable cause to believe is a resort for criminal activities, but it may be their duty to do so. And necessarily much depends upon the ostensible character of the place. In those days when the sale of liquors was licensed, equity would not interfere with the stationing of a policeman outside of the place, although he warned persons from entering.³⁴ On the other hand the proprietor of a hotel or restaurant of respectability may have injunctive relief against the stationing of a uniformed police officer in the place;³⁵ and especially is this true if the trespass has continued for an unreasonable time,³⁶ or if the police furnish no ground on which to base a suspicion that there has been a violation of the criminal laws.³⁷ A reputable cigar and tobacco business may be similarly protected.³⁸

31. *Ulster Square Dealer v. Fowler*, 58 Misc. 325, 111 N. Y. Supp. 16.

32. *Dinsmore v. Board of Police*, 12 Abb. N. C. 436; *Adams Exp. Co. v. Board of Police*, 65 How. Pr. 72.

33. *Kalwin Business Men's Assn. v. McLaughlin*, 216 App. Div. 6, 214 N. Y. Supp. 507.

34. *Delaney v. Flood*, 183 N. Y. 323.

Duty of inspection.—Under the former Liquor Tax Law it was the duty of police officers to inspect places where the sale of liquors was licensed in New York City, and equity would not enjoin a performance of this duty. —*Craushaw v. McAdoo*, 47 Misc. 420, 94 N. Y. Supp. 386.

35. *Levay v. Bingham*, 113 App. Div. 424, 99 N. Y. Supp. 258; *Hertz v. McDermott*, 45 Misc. 28, 90 N. Y. Supp. 803; *Constantine v. New York City*, 116 Misc. 349, 190 N. Y. Supp. 372.

Protection of strangers and immigrants.—The act organizing the metropolitan police district makes it the duty of the board of police to protect "strangers and emigrants," in the streets of the city of New York. The superintendent of police and the captain of the precinct will not be restrained, by injunction, from placing policemen in front of a public house, in which guests have been repeatedly subjected to unjust, exorbitant and illegal charges, and from giving warning to "strangers" about to enter "to be careful." *Prendorill v. Kennedy*, 34 How. Pr. 416.

36. *Constantine v. New York*, 116 Misc. 349, 190 N. Y. Supp. 372.

37. *Levy v. Bingham*, 113 App. Div. 424, 99 N. Y. Supp. 258.

38. *Craushaw v. McAdoo*, 47 Misc. 420, 94 N. Y. Supp. 386.

If the police have reasonable cause to believe that a place is a gambling resort, equity will not enjoin them from watching it, or even from interfering with the business.³⁹ A court of equity will not interfere by injunction to prevent the stationing and keeping of a police officer in a restaurant to inspect the same and prevent gambling therein, when there is evidence to show that the place is a common gambling house, and that it is only when the officer is present that the violation of the law is prevented.⁴⁰ A mere suspicion that gambling is carried on will not, however, justify the permanent posting of an officer in the place.⁴¹ The police will not be permitted to invade a club house or other building of private character, where it is alleged gambling is conducted, and there maliciously break the furniture and damage the interior.⁴² But, if such acts have already been done, and repetition is not reasonably anticipated, the remedy is by damages, not by injunction.⁴³

An injunction should not extend to prohibit the stationing of an officer near the premises of the complaining party.⁴⁴ Ordinarily, it is only a trespass upon his premises which affords any ground for complaint. Watchfulness of the police, although based merely on a suspicion that a crime is being committed, will not be enjoined, unless attended with acts of oppression.⁴⁵

39. *Stevens v. McAdoo*, 112 App. Div. 458, 98 N. Y. Supp. 553; *Cleary v. McAdoo*, 113 App. Div. 178, 99 N. Y. Supp. 60; *Kalwin Business Men's Assn. v. McLaughlin*, 216 App. Div. 6, 214 N. Y. Supp. 507; *Yankee Doodle Boys, Inc. v. McLaughlin*, 127 Misc. 84, 215 N. Y. Supp. 258.

40. *Weiss v. Herlihy*, 23 App. Div. 608, 49 N. Y. Supp. 81.

41. *Hale v. Burns*, 44 Misc. 1, 89 N. Y. Supp. 711, affirmed, 101 App. Div. 101, 91 N. Y. Supp. 929.

42. *Phelps v. McAdoo*, 47 Misc. 524, 94 N. Y. Supp. 265; *Devlin v. McAdoo*, 49 Misc. 57, 96 N. Y. Supp. 425; *Fairmont Athletic Club v. Bingham*, 61 Misc. 419, 113 N. Y. Supp. 905.

43. *Red Raven Social Club v. Bing-*

ham, 62 Misc. 401, 116 N. Y. Supp. 709.

44. *Burns v. McAdoo*, 113 App. Div. 165, 99 N. Y. Supp. 51.

45. *McGorie v. McAdoo*, 113 App. Div. 271, 99 N. Y. Supp. 47.

Oppressive acts.—Where a captain of police for several days kept policemen stationed in plaintiff's store, and caused a patrol wagon to stand in front, and to be driven up and down, with a loud ringing of the bell, and policemen on the outside called out to those offering to enter that it was a suspected poolroom and they might be arrested if they entered, and no arrests were made or warrant issued, a permanent injunction would issue to restrain such trespass. *Cullen v. Bourke*, 93 N. Y. Supp. 1085.

3. Sunday laws.

The application of laws for the observance of Sunday, and the power of courts of equity when the public authorities are mistaken in their application, have frequently presented difficult questions for the courts. This is particularly true as to theatres and athletic contests. Generally speaking, equitable relief has been denied an exhibitor who seeks to restrain the police from interfering with a performance on Sunday. In some cases relief has been denied on the ground that the proposed exhibition was prohibited by law.⁴⁶ In other cases relief has been denied, although the law did not prohibit the exhibition, or without deciding that question.⁴⁷ The general rule that equity will not interfere with the enforcement of the law by the public authorities, is applied. This view is especially sound when the exhibitor is operating under a license whereby he agrees not to open his place of entertainment on Sunday.⁴⁸ If, on the other hand, the license permits Sunday exhibitions, it has been thought that equity could assume jurisdiction of the controversy.⁴⁹

4. Attack on illegal ordinance.

Where a municipal ordinance, or a rule or regulation of some board or commission of a municipality, is alleged to be

46. *Brighton Athletic Club v. McAdoo*, 47 Misc. 432, 94 N. Y. Supp. 391; *Paulding v. Lane*, 55 Misc. 37, 104 N. Y. Supp. 1051; *Ontario Field Club v. McAdoo*, 56 Misc. 285, 107 N. Y. Supp. 295; *Greater Newburgh Amusement Co. v. Sayer*, 81 Misc. 307, 142 N. Y. Supp. 69.

47. *Eden Musee American Co. v. Bingham*, 125 App. Div. 780, 110 N. Y. Supp. 210; *Shepard v. Bingham*, 125 App. Div. 784, 110 N. Y. Supp. 217; *Suesskind v. Bingham*, 125 App. Div. 787, 110 N. Y. Supp. 213; *Symphony Theater Co. v. Ely*, 187 App. Div. 757, 176 N. Y. Supp. 52; *Kenny v. Martin*, 11 Misc. 651, 32 N. Y. Supp. 1087; *Klinger v. Ryan*, 91 Misc. 71, 153 N. Y. Supp. 937; *Chadwick Park Athletic Club v. Peasley*, 142 N.

Y. Supp. 586, affirmed, 161 App. Div. 907, 145 N. Y. Supp. 1117.

Roller skating.—Equity cannot enjoin police officers from entering premises where roller skating is carried on on Sunday, even though the complaint also sets out an action for money damages for unlawful trespass. *Olympic Athletic Club v. Bingham*, 125 App. Div. 793, 110 N. Y. Supp. 216.

Billiard rooms.—An injunction will not be issued to prevent the police from interfering with billiard rooms which are kept open on Sunday. *Kenny v. Martin*, 11 Misc. 651, 32 N. Y. Supp. 1087.

48. *Yorkville Amusement Co. v. Bingham*, 64 Misc. 636, 118 N. Y. Supp. 753.

49. *Thompson v. McClellan*, 118 N. Y. Supp. 114.

illegal and that its attempted enforcement would cause irreparable damage to the business or other property rights of a complaining party, a case for interference by equity is shown.⁵⁰ Equity, however, will not intervene, where the ordinance must be enforced, if at all, by action, and the complaining party can preserve all of his rights by defending when enforcement of the ordinance is sought.⁵¹ When

50. *N. Y. Central & Hudson River R. R. Co. v. City of New York*, 202 N. Y. 212; *Syracuse Ice Cream Co. v. Cortland*, 153 App. Div. 456, 138 N. Y. Supp. 338; *Star Co. v. Brush*, 185 App. Div. 261, 172 N. Y. Supp. 851; *Wald v. Drenan*, 214 App. Div. 647, 212 N. Y. Supp. 451; *Lang's Creamery, Inc. v. City of Niagara Falls*, 224 App. Div. 483, 231 N. Y. Supp. 368; *United Traction Co. v. City of Watervliet*, 35 Misc. 392, 71 N. Y. Supp. 977; *Buffalo Fertilizer Co. v. Town of Cheektowaga*, 61 Misc. 404, 113 N. Y. Supp. 901; *Star Co. v. Brush*, 103 Misc. 631, 170 N. Y. Supp. 987; *Star Co. v. Brush*, 104 Misc. 404, 172 N. Y. Supp. 320; *New York State Railways v. Rochester*, 119 Misc. 128, 195 N. Y. Supp. 783; *Robinson v. Wood*, 119 Misc. 299, 196 N. Y. Supp. 209; *Willerup v. Village of Hempstead*, 120 Misc. 485, 199 N. Y. Supp. 56; *Schenectady R. Co. v. Whitmyre*, 121 Misc. 4, 199 N. Y. Supp. 827; *Prescott v. Pierce*, 130 Misc. 63, 223 N. Y. Supp. 609; *Wood v. Brooklyn*, 14 Barb. 425; *Wiseman v. Close*, 183 N. Y. Supp. 353. "Where an ordinance or regulation is void and its provisions are sought to be enforced, any party whose interests are to be injuriously affected thereby may, and properly ought, go into a court of equity, and have the execution of the ordinance or regulation stayed by injunction." *Buffalo Fertilizer Co. v. Town of Cheektowaga*, 61 Misc. 404, 113 N. Y. Supp. 901.

Railroad tracks in street.—The right of the New York Central and Hudson River Railroad Company as now exer-

cised to maintain tracks in Tenth, Eleventh and Twelfth avenues and West street in the city of New York was originally derived from the state, through the legislature, and not from the city, by a franchise which was not limited in its duration. The legislature intended that the right should be enjoyed by the successors of the grantee, and, hence, the railroad company is entitled to an injunction restraining the city and its officers from removing or attempting to remove such tracks. The legislature may, however, so regulate the plaintiff's railroad in the city of New York as to remove the menace and danger to life occasioned by its present operation. *New York Central, etc., R. Co. v. City of New York*, 202 N. Y. 212.

Papers.—A municipal ordinance prohibiting the sale, circulation or distribution of certain newspapers from the time such ordinance takes effect until the end of the war is beyond the powers of the municipality as it would thereby invade the constitutional rights of a free press. A court of equity may intervene by injunction to restrain the enforcement of said ordinance. *Star Co. v. Brush*, 185 App. Div. 261, 172 N. Y. Supp. 851.

51. *Coykendall v. Hood*, 36 App. Div. 558, 55 N. Y. Supp. 718; *Schulz v. Albany*, 27 Misc. 51, 57 N. Y. Supp. 963, affirmed, 42 App. Div. 437, 59 N. Y. Supp. 235; *Erie R. Co. v. Village of Elmira Heights*, 125 Misc. 441, 211 N. Y. Supp. 688; *West v. Mayor*, 10 Paige 539; *Marvin Safe Co. v. City of New York*, 38 Hun 146; *Mannix v.*

such is the situation, he has an adequate remedy at law.⁵² The court will hesitate to enjoin the enforcement of regulations adopted by a board of health and designed for the protection of the public health.⁵³ Yet a board of health may be restrained from enforcing a regulation which clearly exceeds its powers.⁵⁴

5. Attack on unconstitutional statute.

While recognizing the general rule that equity will not restrain police officers from enforcing the criminal law, it is nevertheless held that equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property.⁵⁵ If there exists an adequate remedy at law, as by way of defense, when it is sought to enforce the statute, equity will not interfere.⁵⁶ Thus, an action in equity cannot be maintained to restrain the further prosecution of an indictment which the plaintiff alleges was found under an unconstitutional statute.⁵⁷

B. Injunction as remedy to enforce penal laws.

Ordinarily equity has not jurisdiction to restrain the commission of certain acts merely because they are in violation of some statute or municipal regulation.⁵⁸ In the

Frost, 100 Misc. 36, 164 N. Y. Supp. 1050, affirmed, 181 App. Div. 961, 168 N. Y. Supp. 1118.

52. *Schulz v. Albany*, 27 Misc. 51, 57 N. Y. Supp. 963, affirmed, 42 App. Div. 437, 59 N. Y. Supp. 235.

53. *Egan v. Health Dept. of N. Y.*, 9 App. Div. 431, 75 St. Rep. 770, 41 N. Y. Supp. 352; *Cohen v. New York City Health Dept.*, 61 Misc. 124, 113 N. Y. Supp. 88.

54. *Golden v. Health Dept. of N. Y.*, 21 App. Div. 420, 47 N. Y. Supp. 623; *Schuster v. Metropolitan Board of Health*, 49 Barb. 450.

55. *Biddles, Inc. v. Enright*, 239 N. Y. 354. See also, *Lee v. O'Malley*, 140 App. Div. 595, 125 N. Y. Supp. 772.

56. *Jo. Indian Hunting & F. Club v. Furman*, 103 Misc. 511, 171 N. Y. Supp. 1015, affirmed, 186 App. Div.

922, 172 N. Y. Supp. 900; *Dibble v. Jones*, 130 Misc. 357, 223 N. Y. Supp. 830.

57. *Buffalo Gravel Corporation v. Moore*, 234 N. Y. 542.

58. *Mt. Vernon v. Seeley*, 74 App. Div. 50, 77 N. Y. Supp. 250; *Village of White Plains v. Tarrytown, etc., Ry. Co.*, 117 App. Div. 841, 103 N. Y. Supp. 1046; *Twiggar v. Rosenberg*, 98 Misc. 86, 163 N. Y. Supp. 771; *Whitridge v. Calestock*, 100 Misc. 367, 165 N. Y. Supp. 640, affirmed, 179 App. Div. 884, 165 N. Y. Supp. 640; *Coley v. Campbell*, 126 Misc. 869, 215 N. Y. Supp. 679; *Village of Brockport v. Johnston*, 13 Abb. N. Cas. 468; *Anderson v. Doty*, 33 Hun 160; *New Rochelle v. Lang*, 75 Hun 608, 59 St. Rep. 616, 27 N. Y. Supp. 600; *Hudson v. Thorne*, 7 Paige 261.

absence of express legislative authority, a municipality cannot enforce its local ordinances through a court of equity, unless the acts sought to be restrained constitute a nuisance.⁵⁹ But, if the Legislature has expressly provided that an action in equity may be maintained to enjoin the violation of an ordinance, a court of equity will obey the mandate of the statute and grant the relief.⁶⁰ A statute thus extending equitable jurisdiction is not unconstitutional as depriving an accused of the right to trial by jury.⁶¹ The Village Law authorizes an injunction for the enforcement of village ordinances.⁶² Local boards of health are authorized to maintain actions to restrain violations of its orders and regulations.⁶³ The Agriculture and Markets Law is enforceable by injunction.⁶⁴ The State courts have jurisdiction of an action brought under section 22 of the National Prohibition Act for an injunction to close a building in which intoxicating liquors are being unlawfully kept or sold.⁶⁵

A private individual ordinarily cannot maintain an action to enjoin the violation of a statute or ordinance enacted for

59. *City of Mt. Vernon v. Seeley*, 74 App. Div. 50, 77 N. Y. Supp. 250; *Village of White Plains v. Tarrytown, etc.*, Ry. Co., 117 App. Div. 841, 102 N. Y. Supp. 1046; *Village of Granville v. Krause*, 131 Misc. 752, 228 N. Y. Supp. 204; *Village of Brockport v. Johnston*, 13 Abb. N. C. 468; *Lampport v. Abbott*, 12 How. Pr. 340; *New Rochelle v. Lang*, 75 Hun 608, 27 N. Y. Supp. 600, 59 St. Rep. 616; *Welsh v. Thomas Cusack Co.*, 196 N. Y. Supp. 435; *Mayor, etc., of Hudson v. Thorne*, 7 Paige 261. See also, *Village of Great Neck Estates v. Bemak & Lehman, Inc.*, 128 Misc. 441, 213 N. Y. Supp. 359.

60. *City of Rochester v. Gutberlett*, 211 N. Y. 309; *City of New York v. Wineburg Adv. Co.*, 122 App. Div. 748, 107 N. Y. Supp. 478; *City of Rochester v. Gutberlett*, 73 Misc. 607, 133 N. Y. Supp. 541, affirmed, 151 App. Div. 900, 135 N. Y. Supp. 1104; *Village of Her-*

kimer v. Potter, 124 Misc. 57, 207 N. Y. Supp. 35.

61. *City of Rochester v. Gutberlett*, 211 N. Y. 309; *City of Rochester v. Gutberlett*, 73 Misc. 607, 133 N. Y. Supp. 541, affirmed, 151 App. Div. 900, 135 N. Y. Supp. 1104.

62. Section 93.

63. *Village of Herkimer v. Potter*, 124 Misc. 57, 207 N. Y. Supp. 35.

64. See section 38. See also, *People v. Clark*, 139 App. Div. 687, 124 N. Y. Supp. 527.

The selling of cold storage eggs, except in original packages, unless branded, stamped or marked "cold storage" may be restrained by injunction. *Department of Farms and Markets v. Swift & Co.*, 105 Misc. 225, 174 N. Y. Supp. 200.

65. *United States v. Myers*, 215 App. Div. 624, 214 N. Y. Supp. 438; *United States v. Sumner*, 125 Misc. 658, 211 N. Y. Supp. 705, affirmed, 216 App. Div. 782, 214 N. Y. Supp. 930.

the protection of the public,⁶⁶ unless the acts of which he complains constitute a nuisance which cause special injury to him.⁶⁷ The violation of a zoning or building ordinance does not authorize an action for an injunction, unless the complaining party is specially damaged, in a legal sense, by the violation.⁶⁸ One's property must be adjacent or so close to the illegal structure as to cause a property damage.

66. *Atkins v. West*, 222 App. Div. 304, 226 N. Y. Supp. 335; *Mellen v. Brooklyn Heights R. Co.*, 87 Misc. 65, 150 N. Y. Supp. 222; *Twigg v. Rosenberg*, 98 Misc. 86, 163 N. Y. Supp. 771; *Schoolhouse v. Browning*, 116 Misc. 338, 190 N. Y. Supp. 353; *Goldsmith v. Jewish Pub. Co.*, 118 Misc. 789, 195 N. Y. Supp. 37; *Owid v. Moushaty*, 125 Misc. 535, 211 N. Y. Supp. 478; *Coley v. Campbell*, 126 Misc. 869, 215 N. Y. Supp. 679; *Anderson v. Doty*, 33 Hun 160; *Empire City Subway Co. v. Broadway & Seventh Ave. R. Co.*, 87 Hun 279, 67 St. Rep. 741, 33 N. Y. Supp. 1055, affirmed on opinion below, 159 N. Y. 555.

Smoking in street cars.—The violation of a city ordinance making smoking in street cars unlawful will not be restrained by injunction. *Mellen v. Brooklyn Heights R. Co.*, 87 Misc. 65, 150 N. Y. Supp. 222.

67. *Dunham v. Binghamton, etc., Baseball Assn.*, 44 Misc. 112, 89 N. Y. Supp. 762; *Young v. Scheu*, 56 Hun 307, 9 N. Y. Supp. 349; *Empire City Subway Co. v. Broadway, etc., R. Co.*, 87 Hun 279, 67 St. Rep. 741, 33 N. Y. Supp. 1055, affirmed on opinion below, 159 N. Y. 555.

68. *Atkins v. West*, 222 App. Div. 304, 226 N. Y. Supp. 335; *Whitridge v. Park*, 100 Misc. 367, 165 N. Y. Supp. 640, affirmed, 179 App. Div. 884, 165 N. Y. Supp. 640; *Cohen v. Rosendale Realty Co.*, 120 Misc. 416, 199 N. Y. Supp. 4, affirmed, 206 App. Div. 681, 199 N. Y. Supp. 916; *Cohen v. Rosevale Realty Co.*, 121 Misc. 618, 202 N. Y. Supp. 95; *Owid v. Moushaty*, 125

Misc. 535, 211 N. Y. Supp. 478; *Coley v. Campbell*, 126 Misc. 869, 215 N. Y. Supp. 679; *Rice v. Van Vranken*, 132 Misc. 82, 229 N. Y. Supp. 32; *Young v. Scheu*, 56 Hun 307, 9 N. Y. Supp. 349; *Walsh v. Thomas Cusack Co.*, 196 N. Y. Supp. 435.

Temporary structure.—Zoning ordinances in force in the city of New York are not intended to prevent a temporary or occasional use of property which is not of a permanent nature. Their purpose is to regulate the construction and use of buildings upon the surface of the land in the particular manner in which the ordinances provide and not to prevent one owning real estate from taking from his property anything which is necessary or valuable which may exist under the surface thereof. The permanency of the structure and use thereof is the criterion of the reasonableness of the ordinances. Accordingly, plaintiff's complaint in an action for a permanent injunction under certain provisions of the so-called zoning ordinances of the city of New York, to restrain the defendants from excavating sand upon their property in violation of provisions prohibiting business buildings in a residential district, should be dismissed on the merits, since it appears that the only structures on the land are of a temporary nature, such as small shanties, erected solely as adjuncts and accessories to the work of removing the sand. *Bartsch v. Ragonette*, 123 Misc. 903, 207 N. Y. Supp. 142.

It is not sufficient that his property be situated in the same restricted zone.⁶⁹

ARTICLE VII.

UNFAIR COMPETITION.

A. In general.

Equity has jurisdiction to restrain the doing of acts which constitute "unfair competition."⁷⁰ A prominent example of the principle is found in the violation of an agreement whereby the seller of a business covenants not to engage in a similar business in a certain territory or during a certain period of time.⁷¹ Likewise, equity will, in some cases, restrain the activities of an employee after the termination of his employment. Of particular importance is the protection of trade secrets acquired by a workman.⁷² The intentional making of false statements as to the products of a competitor constitutes unfair competition, and hence may be enjoined.⁷³ One may be restrained from wrongfully

69. *Atkins v. West*, 222 App. Div. 304, 226 N. Y. Supp. 335.

70. *Acts outside of state.*—Where it is not denied that defendant attempted to purchase from plaintiffs certain goods and upon their failure to agree upon the contract price he went into the Dominion of Canada and manufactured articles similar to those which plaintiff had manufactured for years, for the purpose of injuring plaintiffs, such acts come within the definition of unfair competition, and a motion for an injunction *pendente lite* will be granted plaintiff. *Morris v. Alstedter*, 93 Misc. 329, 156 N. Y. Supp. 1103.

Purchase of commutation tickets.—An action may be maintained in equity by a railroad company against the purchaser of commutation tickets, to restrain him from engaging in the business of selling or hiring such tickets for use by others. *Long Island Ry. Co. v. Lantie*, 136 N. Y. Supp. 138.

71. See, *supra*, II-J, Contract against competition on sale of business.

72. See, *supra*, II-H, Contract regulating conduct of employee after termination of employment.

73. *Allen Mfg. Co. v. Smith*, 224 App. Div. 187, 229 N. Y. Supp. 692; *American Law Book Co. v. Edward Thompson Co.*, 41 Misc. 396, 84 N. Y. Supp. 225; *Old Investors' & Traders' Corp. v. Jenkins*, 133 Misc. 213; *Shever's Ice Cream Co. v. Polar Products Co.*, 194 N. Y. Supp. 44.

Law publishers.—Where the plaintiff and the defendant were rivals in publishing encyclopedias and there was proof that the defendant had made to the plaintiff's subscribers intentional false statements as to the relative merits of the two works to induce them to break their contracts to take the plaintiff's work and accept the defendant's instead, and had agreed to indemnify them against plaintiff's damages for the breach and against the conduct and expense of defending any actions brought against them by the plaintiff for the breach the court

inducing persons to break their contracts with a competitor;⁷⁴ but, if there exists an adequate remedy at law for such a wrong, equity may decline jurisdiction.⁷⁵

B. Trade-marks and trade-names.

1. Federal and state statutes.

The power of the national government over trade-marks is derived from the commerce clause of the federal Constitution and is limited accordingly. That is, Congress may regulate the registration and infringement of trade-marks used in commerce with foreign nations, or among the several States, or with Indian tribes. Federal statutes to this end have been adopted.⁷⁶ These statutes provide for the registration of trade-marks and prescribe remedies, including injunctive relief, for infringements. The power of Congress rests upon a different foundation than its power over the infringement of patents and copyrights. The latter are within the exclusive jurisdiction of the federal courts, regardless of the question of commerce, and State courts have no jurisdiction thereof.⁷⁷ The federal jurisdiction as to trade-marks, however, is concurrent with that of the State courts, and the State courts have retained their power since the enactment of the federal law.⁷⁸ The jurisdiction of the State courts may extend to a trade-mark which has been registered under the federal law.⁷⁹ Under its concurrent jurisdiction, the State Legislature has enacted regu-

condemned these methods as unfair, considered the plaintiff's remedy at law inadequate, and by a preliminary injunction restrained the defendant from further acts of such a nature and from taking over the defense of claims which were the subject of existing indemnity agreements. *American Law Book Co. v. Edward Thompson Co.*, 41 Misc. 396, 84 N. Y. Supp. 225.

74. *Gonzales v. Kentucky Derby Co.*, 197 App. Div. 277, 189 N. Y. Supp. 783, affirmed, 233 N. Y. 607; *Peekskill Theatre v. Advance Theatrical Co.*, 206 App. Div. 138, 200 N. Y. Supp. 726; *American Law Book Co. v. Edward Thompson Co.*, 41 Misc. 396, 84 N. Y.

Supp. 225; *Shever's Ice Cream Co. v. Polar Products Co.*, 194 N. Y. Supp. 44.

75. *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App. Div. 715, 132 N. Y. 37.

76. See sections 81-134 of Commerce and Trade Law.

77. *Oneida Community v. Oneida Game Trap Co.*, 168 App. Div. 769, 154 N. Y. Supp. 391.

78. *Oneida Community v. Oneida Game Trap Co.*, 168 App. Div. 769, 154 N. Y. Supp. 391.

79. *Oneida Community v. Oneida Game Trap Co.*, 168 App. Div. 769, 154 N. Y. Supp. 391.

lations concerning trade-marks which are now contained in sections 360-367 of the General Business Law.

2. Property right in trade-marks.

Under the federal and State statutes, as well as irrespective of such enactments, the manufacturer or vendor of articles of merchandise may adopt a trade-mark to distinguish his goods from those of his competitors.⁸⁰ The adoption of a trade-mark, followed by its use, may give it a substantial value. The trade-mark becomes a property right which is protected against infringement.⁸¹ A trade-mark is a mark attached by the manufacturer and seller of goods to the merchandise produced by him, in order to distinguish them from a like class of merchandise produced by others; and the right to the exclusive use of such mark accrues, not because he was the originator of the same, but because he has applied it to goods of his manufacture and may have acquired a reputation in connection with such mark.⁸² The interests of the public, as well as those of the proprietor, demand the protection of a trade-mark.⁸³

3. Transfer of trade-mark.

A trade-mark is a species of property which is transferable with the business with which it is connected,⁸⁴ but its separation from the business is doubtful.⁸⁵ The trade-name attached to a certain building or parcel of real estate, may pass under a deed of the premises, as an appurtenance, although not specifically mentioned in the deed.⁸⁶ The right to its use during a limited period or in a limited territory, or as to limited products, may be given to another, who may be termed a licensee. The licensee may maintain a suit to

80. *Amoskeag Mfg. Co. v. Spear*, 4 N. Y. Super. (2 Sandf.) 599.

81. *Colman v. Crump*, 70 N. Y. 573; *Cash, Inc. v. Steinbook*, 220 App. Div. 569, 220 N. Y. Supp. 293; *Clark v. Clark*, 25 Barb. 76; *Strasser v. Moonelis*, 55 Super. Ct. (23 J. & S.) 197, 11 St. Rep. 270, 28 Week. Dig. 68, appeal dismissed, 108 N. Y. 611.

82. *Jaeger's Sanitary Woolen System Co. v. LeBoutillier*, 47 Hun 521, 15 St. Rep. 117.

83. *Matsell v. Flanagan*, 2 Abb. Pr. N. S. 459.

84. *Julius Bien Co. v. Franklin*, 87 Misc. 434, 151 N. Y. Supp. 23.

85. *Rockowitz C. & B. Corp. v. Madame X. Co.*, 248 N. Y. 272; *Julius Bien Co. v. Franklin*, 87 Misc. 434, 151 N. Y. Supp. 23.

86. *Stogap Realty Co. v. Marie Antoinette Hotel Co.*, 217 App. Div. 555, 217 N. Y. Supp. 106.

restrain an interference with his rights;⁸⁷ or the licensee may be restrained from further use of the trade-mark after the expiration of the term of the license.⁸⁸

One who voluntarily transfers a business and the good-will that belongs to it is estopped from interfering by his own acts with the value of the good-will; while, upon a transfer in *invitum*, as in bankruptcy, the former owner of the good-will may compete with the transferee as with a stranger.⁸⁹ Upon the sale of the business and the good-will of a bankrupt corporation, the right to use a trade-name adopted by the corporation to designate its business, but which does not represent the personal skill of some individual connected with the business, passes to the purchaser.⁹⁰

Upon the dissolution of a firm, where one of the partners purchases and succeeds to the business, the exclusive right to the use of the firm name, even as against the retiring partner, passes to the purchasing partner, even though no mention of such right is expressly made in the dissolution agreement.⁹¹

4. Abandonment of trade-mark.

A trade-mark may be abandoned by its owner, so that an action for infringement will fail. To constitute an abandonment there must be, not only a non-user, but an intent to abandon.⁹² Intent, in this connection, may be a question of fact.⁹³

5. What constitutes an infringement.

In order to constitute an infringement, it is not necessary that the attempted simulation be identical with the original trade-mark.⁹⁴ If the false is only colorably different

87. Jergens Co. v. Woodbury, 197 N. Y. 66.

88. Laurer Brewing Co. v. Ehresman, 127 App. Div. 486, 111 N. Y. Supp. 266; Waterproofing Co. v. Hydrolithic Cement Co., 153 App. Div. 47, 138 N. Y. Supp. 265.

89. Hotel Claridge Co. v. Rector, Inc., 164 App. Div. 185, 149 N. Y. Supp. 748; VanDyk Co. v. Reilly Co., 73 Misc. 87, 130 N. Y. Supp. 755; Buffalo Oyster Co. v. Nenno, 132 Misc. 213, 229 N. Y. Supp. 210.

90. VanDyk Co. v. Reilly Co., 73 Misc. 87, 130 N. Y. Supp. 755.

91. Steinfeld v. National Shirt Waist Co., 99 App. Div. 286, 90 N. Y. Supp. 964.

92. Rockowitz C. & B. Corp. v. Madame X. Co., Inc., 248 N. Y. 272.

93. Rockowitz C. & B. Corp. v. Madame X. Co., Inc., 248 N. Y. 272.

94. Cash, Inc. v. Steinbook, 220 App. Div. 569, 220 N. Y. Supp. 293; Louis Restaurant, Inc. v. Coffey, 132 Misc. 690, 130 N. Y. Supp. 82.

from the true, or if the resemblance is such as to deceive a purchaser of ordinary caution, or if it is calculated to deceive the careless or unwary, the court may find that the trade-mark has been infringed.⁹⁵ A true test is whether the resemblance is calculated to produce confusion as to identity

95. *Colman v. Crump*, 70 N. Y. 573; *Fort Stanwix Canning Co. v. William McKinley Canning Co.*, 49 App. Div. 566, 63 N. Y. Supp. 704; *Luyties Bros. v. Zimmermann & Co.*, 149 App. Div. 542, 133 N. Y. Supp. 997; *Cash, Inc. v. Steinbook*, 220 App. Div. 569, 220 N. Y. Supp. 293; *Clark v. Clark*, 25 Barb. 76; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416. "It is not necessary that symbol, figure or device used or printed or sold for use, should be a *fac simile*, a precise copy, of the original trade-mark, or so close an imitation that the two cannot be distinguished except by an expert, or upon a critical examination by one familiar with the genuine trade-mark. If the false is only colorably different from the true; if the resemblance is such as to deceive a purchaser of ordinary caution; or if it is calculated to deceive the careless and unwary; and thus to injure the sale of the goods of the proprietor of the trade-mark, the injured party is entitled to relief." *Colman v. Crump*, 70 N. Y. 573. "It is much more easy, of course, in any case to recognize a difference, however minute, after it is pointed out, than to discover it by the ordinary inspection bestowed by purchasers. It would hardly be a fair test of a counterfeit that, after its errors and deviations from the original were known, it could not be mistaken for it. The proper question should be, not differences, but points of resemblances; not the utmost vigilance of purchasers, but ordinary observation. The value of the goods to be sold, and the intelligence of the persons dealing in and consuming them, besides other circumstances, are

also to be taken into account in determining the adaptability of a simulated trade-mark to deceive purchasers. It is eminently, therefore, a question of fact, to be submitted to the practical experience of a jury, whether, in particular case, a resemblance was likely to deceive the community." *Swift v. Day*, 27 Super. Ct. (4 Rob.) 611.

Matters considered on question of infringement.—"Of course, in many cases the dissimilarity between the genuine and the alleged infringing trade-mark is so marked that it can be readily determined that no infringement exists; and in other cases the similarity is so great that the infringement is palpable; but in a case where the marks of similarity or dissimilarity are so evenly balanced, that from mere inspection of the trade-mark a different conclusion might be reached by different persons, as to whether or not the case falls within the rule above quoted: 'If the resemblance is such as to deceive a purchaser of ordinary caution, or if it be calculated to deceive the careless and unwary,' it would seem clear that all the circumstances attending the adoption and use of the trade-mark should be considered; the situation of the parties, the intent with which the alleged infringing trade-mark was adopted, the manner in which it was used, and the actual effect its use had, so far as can be ascertained, to aid the court in reaching a proper conclusion." *Fort Stanwix Canning Co. v. William McKinley Canning Co.*, 49 App. Div. 566, 63 N. Y. Supp. 704.

and consequent damage.⁹⁶ On the other hand, when there is such an absence of resemblance that ordinary attention will enable customers to discriminate between the trade-marks of different parties, the courts will not interfere.⁹⁷ The tendency of the courts is to determine the issues as a question of "unfair competition."⁹⁸

The plaintiff is not required to prove a large number of sales of goods with the counterfeit trade-mark. In fact, if a dealer has the imitated articles in his store and offers them for sale as genuine, an infringement may be adjudged, although but a single sale is proved.⁹⁹

6. Products not competitive.

The law of trade-marks and trade-names is applied when similar marks are used on similar goods. If the products of two dealers are not competitive, the use of a similar mark or name causes no damage to the one first adopting the device, and the court will not interfere.¹ Thus, a trade-mark adopted by the manufacturer of motor vehicles may properly be used by the manufacturer of fire extinguishers.² The courts will not enjoin the use of a name for a hotel, although such name has previously been used to designate an apartment house.³ The use of a name in the conducting of a beauty parlor does not infringe a jeweler's right to use such name as a trade-mark.⁴ On the other hand, there may exist such competition between a wholesaler and a retailer, or between one selling to the wholesale trade and one selling to retail dealers, that injunctive relief is proper.⁵ An operator of a taxicab may be enjoined from using a taxicab

96. *Louis Restaurant, Inc. v. Coffey*, 132 Misc. 690, 130 N. Y. Supp. 82.

97. *Hier v. Abrahams*, 82 N. Y. 519; *Allen Mfg. Co. v. Smith*, 224 App. Div. 187, 229 N. Y. Supp. 692.

98. *Bregstone v. Greenberg*, 192 App. Div. 213, 182 N. Y. Supp. 340.

99. *Low v. Hart*, 90 N. Y. 457.

1. *Corning Glass Works v. Corning Cut Glass Co.*, 197 N. Y. 173; *Simplex Automobile Co. v. Kahnweiler*, 162 App. Div. 480, 148 N. Y. Supp. 617; *German-American Button Co. v. Heymsfeld*, 170 App. Div. 416, 156 N. Y. Supp. 223;

Longenecker v. Longenecker Bros., 140 N. Y. Supp. 403; *Amoskeag Mfg. Co. v. Garner*, 6 Abb. Pr. N. S. 265.

2. *Simplex Automobile Co. v. Kahnweiler*, 162 App. Div. 480, 148 N. Y. Supp. 817.

3. *Astor v. West Eighty-second Street Realty Co.*, 167 App. Div. 273, 152 N. Y. Supp. 631.

4. *Tecla Corp. v. Salon Tecla Ltd.*, 223 App. Div. 17, 227 N. Y. Supp. 277.

5. *Fishel & Sons, Inc. v. Distinctive Jewelry Co.*, 196 App. Div. 779, 188 N. Y. Supp. 633.

which infringes the trade-mark of a manufacturer of such vehicles.⁶

If the plaintiff is damaged because the articles sold by the defendant are closely related to those presently sold by the plaintiff and identical with those which the plaintiff has sold and intends to sell in the future, there is direct appropriation of the plaintiff's good will. In the enjoyment of its trade name the plaintiff is to be protected not only with respect to the merchandise it presently sells, but also with respect to that which the public would believe, through the deception practiced by the defendant, that the plaintiff was selling. When a trade-mark has been used by the owner and by another on goods of the same class, though different in species, the question whether they are so closely related—so near akin—as to be regarded as having the “same descriptive properties” arises. On the showing that the two classes of merchandise involved are of the same general description, injunctions are issued to protect the plaintiff's trade-mark and good will.⁷

7. Injunction as appropriate remedy for infringement.

It is of interest that in early times the common law courts in England assumed jurisdiction of the infringement of trade-marks, and the courts of equity refused to interfere.⁸ Now the remedy exclusively used is an action in equity for an injunction restraining the unlawful interference.⁹ Injunctive relief is justified on the ground of the inadequacy of relief in an action for damages, the continuous nature of the wrong, and the avoidance of a multiplicity of actions

6. *Checker Cab Mfg. Co. v. Sweeney*, 119 Misc. 780, 197 N. Y. Supp. 284.

7. *Long's Hat Stores Corps. v. Long's Clothes, Inc.*, 224 App. Div. 497.

8. *Clinton Metallic Paint Co. v. N. Y. Metallic Paint Co.*, 23 Misc. 66, 50 N. Y. Supp. 437.

9. *Colman v. Crump*, 70 N. Y. 573; *Tecla Corp. v. Salon Tecla, Ltd.*, 249 N. Y. 157; *Barrett Chemical Co. v. Stern*, 56 App. Div. 143, 67 N. Y. Supp. 595; *Mark Realty Corp. v. Hirsch*, 180 App. Div. 549, 168 N. Y. Supp. 244; *Parsons Trading Co. v. Hoffman*, 107 Misc. 536, 177 N. Y. Supp. 713, af-

firmed, 192 N. Y. Supp. 942; *Bush Terminal Co. v. Bush Terminal Trucking Co.*, 123 Misc. 448, 206 N. Y. Supp. 2; *Goldman & Bros., Inc. v. Goldstein*, 125 Misc. 737, 211 N. Y. Supp. 872; *Petridge v. Merchant*, 4 Abb. Pr. 156; *Clark v. Clark*, 25 Barb. 76; *Priestly v. Adams*, 59 Hun 380, 36 St. Rep. 536, 13 N. Y. Supp. 41; *Amoskeag Mfg. Co. v. Spear*, 4 N. Y. Super (2 Sandf.) 599; *Coats v. Holbrook*, 2 Sandf. Ch. 586, 3 N. Y. Leg. Obs. 404; *Taylor v. Carpenter*, 2 Sandf. Ch. 603, affirmed, 2 Sandf. Ch. 611, 11 Paige, 292.

for particular cases of infringement.¹⁰ In order to secure injunctive relief, it is not necessary for the plaintiff to show that any person has actually been deceived by the similarity between the true and the false trade-marks; it is sufficient if the infringement is threatening an injury to the plaintiff's business. The plaintiff is not required to wait until he has suffered a substantial pecuniary loss.¹¹ It is no defense that the article with the counterfeit mark is equal in quality to that with the genuine trade-mark.¹²

An injunction is granted only when necessary for the plaintiff's protection. If the defendant has innocently infringed the plaintiff's trade-mark, but has discontinued such acts upon learning of the plaintiff's rights, an injunction may be refused.¹³

8. Absence of intention to infringe.

The plaintiff is not bound to show the guilty knowledge of the defendant or his fraudulent intent to injure the plaintiff.¹⁴ The trade-mark is protected as a property right, and, if the owner's business is prejudiced by an

10. *Priestly v. Adams*, 59 Hun 380, 36 St. Rep. 536, 13 N. Y. Supp. 41.

11. *Vulcan v. Myers*, 139 N. Y. 364; *Barrett Chemical Co. v. Stern*, 56 App. Div. 143, 67 N. Y. Supp. 595; *Material Men's Mercantile Assn. v. New York Material Men's Mercantile Assn.* 169 App. Div. 843, 155 N. Y. Supp. 706; *Mark Realty Corp. v. Hirsch*, 180 App. Div. 549, 168 N. Y. Supp. 244; *Lucile, Limited, New York and Paris, v. Schrier*, 191 App. Div. 567, 181 N. Y. Supp. 694; *Gaines & Co. v. Leslie*, 25 Misc. 20, 54 N. Y. Supp. 421; *Checker Cab Mfg. Co. v. Sweeney*, 119 Misc. 780, 197 N. Y. Supp. 284; *Columbia Grammar School v. Clawson*, 120 Misc. 841, 200 N. Y. Supp. 768; *Bush Terminal Co. v. Bush Terminal Trucking Co.*, 123 Misc. 448, 206 N. Y. Supp. 2; *Kinsley v. Jacoby*, 28 Abb. N. C. 451, 20 N. Y. Supp. 46; *Partridge v. Menck*, 2 Barb. Ch. 101, 5 N. Y. Leg. Obs. 94, affirmed, 1 How. App. Cas. 547.

12. *Coats v. Holbrook*, 2 Sandf. Ch. 586, 3 N. Y. Leg. Obs. 404; *Taylor v.*

Carpenter, 2 Sandf. Ch. 603, affirmed, 2 Sandf. Ch. 611, 11 Paige 292.

13. *Butterfield & Co. v. Abraham & Straus, Inc.*, 212 App. Div. 384, 208 N. Y. Supp. 740, affirmed, 241 N. Y. 560.

14. *Colman v. Crump*, 70 N. Y. 573; *Hier v. Abrahams*, 2 N. Y. 519; *Vulcan v. Myers*, 139 N. Y. 364; *Barrett Chemical Co. v. Stern*, 56 App. Div. 143, 67 N. Y. Supp. 595; *Oneida Community v. Oneida Game Trap Co.*, 168 App. Div. 769, 154 N. Y. Supp. 391; *Phenix Cheese Co. v. Kirp.*, 176 App. Div. 735, 164 N. Y. Supp. 71; *Bulena v. Newman*, 10 Misc. 460, 64 St. Rep. 26, 31 N. Y. Supp. 449; *Clinton Metallic Paint Co. v. N. Y. Metallic Paint Co.*, 23 Misc. 66, 50 N. Y. Supp. 427; *Gaines & Co. v. Leslie*, 25 Misc. 20, 54 N. Y. Supp. 421; *Bush Terminal Co. v. Bush Terminal Trucking Co.*, 123 Misc. 448, 206 N. Y. Supp. 2; *Dale v. Smithson*, 12 Abb. Pr. 237; *American Grocer Pub. Assn. v. Grocer Pub Co.*, 25 Hun 398.

imitation, it is no defense that the imitator did not intend to injure the plaintiff.¹⁵ The violation of the proprietor's legal rights is, in legal contemplation, a fraud.¹⁶ But, upon the question of damages sustained by the plaintiff, the intent to deceive and the deception accomplished, may be material.¹⁷ Moreover, the intention of the parties may be important where the trade-marks are so dissimilar that there is considerable doubt as to an infringement.¹⁸

9. Name as trade-mark.

As a general rule, one has the right to attach to articles which he manufactures or sells a distinctive name, which he may appropriate as a trade-mark.¹⁹ That is to say, a trade-mark may consist of a name, and may be protected as such to the same extent as courts will protect trade-marks in the form of devices or symbols.²⁰ The use of some words,

15. *Hier v. Abrahams*, 82 N. Y. 519; *Clinton Metallic Paint Co. v. N. Y. Metallic Paint Co.*, 23 Misc. 66, 50 N. Y. Supp. 427.

16. *Hier v. Abrahams*, 82 N. Y. 519; *Taylor v. Carpenter*, 2 Sandf. Ch. 603, affirmed, 2 Sandf. Ch. 611, 11 Paige 292.

17. *Barrett Chemical Co. v. Stern*, 56 App. Div. 143, 67 N. Y. Supp. 595.

18. *Munro v. Smith*, 36 St. Rep. 841, 13 N. Y. Supp. 708, affirmed, 128 N. Y. 680.

19. *Hier v. Abrahams*, 82 N. Y. 519; *Selchow v. Baker*, 93 N. Y. 59; *Waterman v. Shipman*, 130 N. Y. 301; *Jergens Co. v. Woodbury*, 197 N. Y. 66; *Parsons Trading Co. v. Hoffman*, 107 Misc. 536, 177 N. Y. Supp. 713, affirmed, 192 N. Y. Supp. 942; *Priestly v. Adams*, 59 Hun 380, 36 St. Rep. 536, 13 N. Y. Supp. 41.

"*Priestley's*."—In an action brought by Briggs Priestley and others to restrain the defendants from advertising, selling, or offering for sale, any goods as "*Priestley's*" which were not manufactured by the plaintiffs, it appeared that the plaintiffs were manufacturers of a class of goods marked and sold as "*Priestley's Silk Warp Henrietta*." That the defendants had advertised

goods for sale as "*Priestley's Henriettas*," representing them on the sale to be those of Priestley's manufacture, which was untrue. Held, That the plaintiffs were entitled to the relief asked for, and that the defendants could not, by the omission of the words "*silk warp*," avoid the issuing of an injunction to restrain this use of the plaintiff's name. *Priestley v. Adams*, 59 Hun 380, 36 St. Rep. 536, 13 N. Y. Supp. 41.

20. *Hier v. Abrahams*, 82 N. Y. 519; *Barrett Chemical Co. v. Stern*, 56 App. Div. 143, 67 N. Y. Supp. 595; *Laurer Brewing Co. v. Ehresman*, 127 App. Div. 486, 111 N. Y. Supp. 266; *Mark Realty Corp. v. Hirsch*, 180 App. Div. 549, 168 N. Y. Supp. 244; *Lucile, Limited v. Schrier*, 191 App. Div. 567, 181 N. Y. Supp. 694; *Fishel & Sons, Inc. v. Distinctive Jewelry Co.*, 196 App. Div. 779, 188 N. Y. Supp. 633; *Cash, Inc. v. Steinbook*, 220 App. Div. 569, 220 N. Y. Supp. 293; *Bush Terminal Co. v. Bush Terminal Trucking Co.*, 123 Misc. 448, 206 N. Y. Supp. 2; *Louis' Restaurant, Inc. v. Coffey*, 132 Misc. 690, 130 N. Y. Supp. 82; *Brooklyn White Lead Co. v. Masury*, 25 Barb. 416.

however, will never ripen into a trade-mark. The name must be original; it must be an arbitrary or fanciful name, not in itself descriptive of the article or its component parts.²¹ So long as other persons have a right to market the merchandise, they have a right to describe them properly, and one cannot appropriate for his exclusive use words which are normally descriptive of such merchandise.²² Whether a name claimed as a trade-mark is subject to the objection of being descriptive, or whether it is an arbitrary or fancy name, must depend upon the circumstances of each case as it arises.²³ A geographical term may not be appropriated as a trade-mark.²⁴ But even though certain words are not such that a person may acquire an exclusive right to the use thereof as a trade-name, they may acquire in the trade a secondary meaning as identifying the business or goods of such person, and relief on the ground of unfair competition may be granted as against one who knowingly uses such words to deceive persons in buying his goods.²⁵

The tests for determining the existence of an infringement of a trade-mark in the form of a name are different from those in cases of other symbols. A trade-mark in the form of an arbitrary device is infringed when an imitation is

21. *Selchow v. Baker*, 93 N. Y. 59.

22. *Selchow v. Baker*, 93 N. Y. 59; *Cohn v. Reynolds*, 26 Misc. 473, 57 N. Y. Supp. 469.

"Employers' Liability."—The term "Employers' Liability," as used in the insurance business, is descriptive, and cannot be appropriated as a trade-name. *Employers' Liability Assurance Corp. v. Employers' Liability Ins. Co.*, 61 Hun 552, 41 St. Rep. 390, 16 N. Y. Supp. 397.

"Narcissus."—One marketing a perfume under the name "Le Narcisse Noir," meaning black narcissus, cannot restrain one from using the name "narcissus" in its normal, descriptive sense. *Caron Corp. v. Conde*, 126 Misc. 676, 213 N. Y. Supp. 735.

23. *Selchow v. Baker*, 93 N. Y. 59.

"Valet."—The use of the foreign word "valet," as a designation for the business of collecting and renovating

worn clothing, is new and peculiar, and a person, earliest entitled to so use in a city the name "The Brooklyn Valet," may restrain a city competitor in the same business from using the words "My Valet" in his trade and on his signs. *Cohn v. Reynolds*, 26 Misc. 473, 57 N. Y. Supp. 469.

24. *Butterfield & Co. v. Abraham & Straus, Inc.*, 212 App. Div. 384, 208 N. Y. Supp. 740, affirmed, 241 N. Y. 560.

"Normandy."—The use of the word "Normandy" in connection with the sale of voile fabrics, does not make it a valid common law trade-mark. *Butterfield & Co. v. Abraham & Strauss, Inc.*, 212 App. Div. 384, 208 N. Y. Supp. 740, affirmed, 241 N. Y. 560.

25. *Fishel & Sons v. Distinctive Jewelry Co.*, 196 App. Div. 779, 188 N. Y. Supp. 633.

used which will deceive the eye of an ordinary buyer.²⁶ But where the trade-mark consists of a word, it may be used by the manufacturer who has appropriated it, in any style of print, or on any form of label, and its use by another in any form is unlawful. It is required only that the imitation should be either the same to the eye, or in sound to the ear as the genuine trade-mark. The goods become known by the name or word by which they have been designated, and not merely by the manner or fashion in which the word is written or printed, or the accessories surrounding it, and the unlawful use of the name or word in any form may be restrained.²⁷

The name of a newspaper, magazine or other publication will be protected by injunction.²⁸ The name adopted by a

26. "Pinoleum," a catarrh remedy, may be infringed by a similar remedy sold under the name of "Baco Pinol Spray." *Pinoleum Co. v. Baron*, 121 Misc. 384, 201 N. Y. Supp. 44.

27. Hier v. Abrahams, 82 N. Y. 519; *Gaines & Co. v. Leslie*, 25 Misc. 20, 54 N. Y. Supp. 421.

"The Hero Brand," as applied to shirts, infringed by "The Aero Brand." *Bregstone v. Greenberg*, 192 App. Div. 213, 182 N. Y. Supp. 340.

Name of school.—A school which has prepared students for entrance to Columbia University and has used for many years the name "Columbia Grammar School," may restrain the use by another school of the name "Columbia Preparatory School." *Columbia Grammar School v. Clason*, 120 Misc. 841, 200 N. Y. Supp. 768.

"Cash's mee-tee nuts," with the slogan, "Every good nut that grows," protected against "Steinbook's tas-tee nuts," with the slogan, "Every fine nut that grows." *Cash, Inc. v. Steinbook*, 220 App. Div. 569, 220 N. Y. Supp. 293.

"Old Crow" whiskey.—A right of trade-mark in the words "Old Crow" as applied to packages of whiskey, is infringed by a label bearing the words "White Crow," although the label is

dissimilar in lettering and general appearance. *Gaines & Co. v. Leslie*, 25 Misc. 20, 54 N. Y. Supp. 421.

"Equity specialty shop."—In an action by the plaintiff, doing business under the trade name "Equity Specialty Shop," to restrain the defendants from using the name "Equity Gown Shop" in connection with their business of selling women's apparel, which action is based on the ground of unfair competition, an injunction *pendente lite*, should have been granted, since it appears that defendants established their store in the same block and on the said side of the street as plaintiff's store; that the two stores are separated by a very small store; that the situation of the two stores is such as to lead customers to believe that both stores are but one establishment; that the physical appearance of defendant's store was apparently designed to create confusion in the minds of buyers, especially those not very familiar with the plaintiff's store, and that confusion has already resulted in the mail addressed to one or the other of the parties. *Salamy v. Sorgeus*, 213 App. Div. 160, 210 N. Y. Supp. 246.

28. Salvation Army in U. S. v. *American Salvation Army*, 135 App. Div. 263, 120 N. Y. Supp. 471, appeal

hotel, restaurant, theatre, or other place of entertainment may be a trade-name, and a competitor may be restrained from using the same name or a name so similar as to create confusion.²⁹ The title of a drama or photo-play may be protected as a trade-name.³⁰ The manufacturer of automobiles may restrain others from dealing in motor vehicles or accessories or attachments under a similar name.³¹

10. Right to use one's own name.

It is a general principle of law that a man's own name is his property, and he has the same right to its use and enjoyment as he has to that of any other species of property.³² He has also the right to have his own name used as

withdrawn, 200 N. Y. 555; *American Grocer Pub. Assn. v. Grocer Pub. Co.*, 25 Hun 398; *Matsell v. Flannigan*, 2 Abb. Pr. N. S. 459.

"Drawing made easy."—The plaintiff cannot restrain the defendant from using the words "Drawing Made Easy" as the title to a book sold by the defendant, where it appears that the defendant's predecessor published and copyrighted a book under that name before the plaintiff published his book and procured a trade-mark thereupon, though after the plaintiff had procured his trade-mark the defendant acquired title to its book and republished and recopyrighted it. *Clode v. Scribner's Sons*, 200 App. Div. 532, 193 N. Y. Supp. 176.

29. *Hotel Claridge Co. v. Rector, Inc.*, 164 App. Div. 185, 148 N. Y. Supp. 748; *Mark Realty Corp. v. Hirsch*, 180 App. Div. 549, 168 N. Y. Supp. 244; *Stogop Realty Co. v. Marie Antoinette Hotel Co.*, 217 App. Div. 555, 217 N. Y. Supp. 106.

30. *Frohman v. Payton*, 34 Misc. 275, 68 N. Y. Supp. 850; *Dickey v. Mutual Film Co.*, 186 App. Div. 701, 174 N. Y. Supp. 784; *Dickey v. Mutual Film Corp.*, 160 N. Y. Supp. 609.

"Chantecler."—The word "Chantecler" as applied to a play in which every character represents a barnyard

fowl or animal has not such a descriptive character as to preclude its exclusive appropriation. The owner of the play "Chantecler" will be granted an injunction against the presentation of a burlesque thereof under the name "Chantclair" upon the ground that, as shown by the affidavits, the public will be deceived and misled. The fact that the first actual production of the burlesque was made in Europe by persons from whom defendants obtained their rights therein, before "Chantecler" was produced is no reason for denying the owner of "Chantecler" an injunction restraining the production of "Chantclair," no claim being made that the latter name was not adopted by its author with full knowledge of what the author of "Chantecler" had previously done. *Frohman v. Morris, Ins.*, 68 Misc. 461, 123 N. Y. Supp. 1090.

31. *Ford Motor Co. v. Cady Co.*, 124 Misc. 678, 208 N. Y. Supp. 574, modified 216 App. Div. 786, 214 N. Y. Supp. 638; *Buick Motor Company v. Buick Used Motor, Inc.*, 132 Misc. 150, 229 N. Y. Supp. 3.

32. *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; *World's Dispensary Medical Assn. v. Pierce*, 203 N. Y. 419; *DeLong v. DeLong Hook & Eye Co.*, 7 App. Div. 33, 39 N. Y. Supp. 903; *Lucile, Limited v. Schrier*, 191

part of the name of a corporation in which he is interested.³³ Or he may enter into a partnership adopting a firm title that includes his name.³⁴ If he acts in good faith and does not intentionally deceive the public or mislead those with whom he seeks to do business, a competitor cannot complain.³⁵ One cannot make a trade-mark of his own name so as to exclude others with a similar name from a proper use of their own names in their businesses.³⁶ The general principle is not extended to the use of initials.³⁷

On the other hand, the court will protect an established trade-name as far as possible without interfering with the right of another to use his own name.³⁸ Although one has a right to use his own name, the *manner* in which he uses it may be regulated by the courts.³⁹ The proprietor of a trade-name has a right to require a person to use his own name in such a way as not to cause injury or to mislead the public.⁴⁰ One having a name similar to that used as a trade-name by another cannot sell his goods as the goods manufactured by the proprietor of the trade-name. He may not, through unfairness, artifice, misrepresentation or fraud, injure the business of another or induce the public to believe his product is the product of that other.⁴¹ The surrounding

App. Div. 567, 181 N. Y. Supp. 694; *Bregstone v. Greenberg*, 192 App. Div. 213, 182 N. Y. Supp. 340; *Elize Costume Co. v. Elize*, 206 App. Div. 503, 201 N. Y. Supp. 545; *C. Kurtzmann & Co. v. Kurtzmann*, 84 Misc. 478, 147 N. Y. Supp. 673; *Shangold v. Berson*, 125 Misc. 646, 211 N. Y. Supp. 695; *Buffalo Oyster Co., Inc. v. Nenno*, 132 Misc. 213, 229 N. Y. Supp. 210; *Decker v. Decker*, 52 How. Pr. 218.

33. *Romeike v. Romeike & Co.*, 179 App. Div. 712, 167 N. Y. Supp. 235, affirmed, 227 N. Y. 561; *Elize Costume Co. v. Elize*, 206 App. Div. 503, 201 N. Y. Supp. 545.

34. *Hildreth v. McCaul*, 70 App. Div. 162, 74 N. Y. Supp. 1072.

35. *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; *Hildreth v. McCaul*, 70 App. Div. 162, 74 N. Y. Supp. 1072.

36. *Hildreth v. McCaul*, 70 App. Div. 162, 74 N. Y. Supp. 1072.

37. *Goldman & Bros., Inc. v. Gold-*

stein, 125 Misc. 737, 211 N. Y. Supp. 872.

38. *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; *Lucile, Ltd. v. Schrier*, 191 App. Div. 567, 181 N. Y. Supp. 694; *Westphal v. Westphal's, etc., Corp.*, 216 App. Div. 53, 215 N. Y. Supp. 4, affirmed, 243 N. Y. 639; *Macfadden Publications v. Macfadden, Inc.*, 224 App. Div. 374, 231 N. Y. Supp. 185; *C. Kurtzmann & Co. v. Kurtzmann*, 84 Misc. 478, 147 N. Y. Supp. 673; *Tierney Sons, Inc. v. Tierney Bros., Inc.*, 130 Misc. 428, 224 N. Y. Supp. 144.

39. *Hildreth v. McCaul*, 70 App. Div. 162, 74 N. Y. Supp. 1072; *Macfadden Publications v. Macfadden, Inc.*, 224 App. Div. 374, 231 N. Y. Supp. 185.

40. *World's Dispensary Medical Assn. v. Pierce*, 203 N. Y. 419.

41. *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; *World's Dispensary Medical Assn. v. Pierce*, 203 N. Y.

circumstances will usually indicate whether one is honestly using his own name or whether he is fraudulently attempting to capitalize the similarity of his own name to that of an established trade-name.⁴² If fraudulent intent appears, the injunction order may be very broad.⁴³

One may by contract surrender the right to use his own name. This situation may arise upon the sale of a business with the good will thereof, in which case the seller may be restrained from starting thereafter a competing business under his own name.⁴⁴ But, even if one has given another the right to use his own name, he still preserves a sufficient interest in it to prevent its use by a stranger.⁴⁵ If one has not surrendered his right to the use of his own, another cannot use it without his consent.⁴⁶

11. Similarity of corporate names.

Section 6 of the General Corporation Law forbids the filing of a certificate of incorporation of a domestic corporation, the designation of a foreign corporation and an authorization of a foreign corporation to do business in this State, if its name is the same as that of a domestic corporation or so nearly resembling it as to be calculated to deceive. Injunction is a proper remedy to restrain a corporation from using the same or a similar name.⁴⁷ It is

419; *Bregstone v. Greenberg*, 192 App. Div. 213, 82 N. Y. Supp. 340; *Westphal v. Westphal's, etc., Corp.*, 216 App. Div. 53, 215 N. Y. Supp. 4, affirmed, 243 N. Y. 639; *C. Kurtzmann & Co. v. Kurtzmann*, 84 Misc. 478, 147 N. Y. Supp. 673; *Tierney Sons, Inc. v. Tierney Bros., Inc.*, 130 Misc. 428, 224 N. Y. Supp. 144; *Buffalo Oyster Co., Inc. v. Nenno*, 132 Misc. 213, 229 N. Y. Supp. 210.

42. *Westphal v. Westphal's, etc., Corp.*, 216 App. Div. 53, 215 N. Y. Supp. 4, affirmed, 243 N. Y. 639.

43. *Westphal v. Westphal's, etc., Corp.*, 216 App. Div. 53, 215 N. Y. Supp. 4, affirmed, 243 N. Y. 639.

44. *Ajax Tool Co. v. Buchalter Tool Co.*, 125 Misc. 752, 211 N. Y. Supp. 241. See also, *Burrow v. Marceau*, 124 App. Div. 665, 109 N. Y. Supp. 105.

45. *Ohlbaum v. Correa*, 178 App. Div. 838, 166 N. Y. Supp. 89.

46. *Scheer v. American Ice Co.*, 32 Misc. 351, 66 N. Y. Supp. 3.

47. *Benevolent & Protective Order of Elks v. Improved Benevolent, etc.*, 205 N. Y. 459; *Metropolitan Teleph. & Teleg. Co. v. Metropolitan Teleph. & Teleg. Co.*, 156 App. Div. 577, 141 N. Y. Supp. 598; *Material Men's Mercantile Assn. v. New York Material Men's Mercantile Assn.*, 169 App. Div. 843, 155 N. Y. Supp. 706; *German American Button Co. v. Heymsfeld*, 170 App. Div. 416, 156 N. Y. Supp. 223; *Lerner Stores Corp. v. Lerner Ladies' Apparel Shop, Inc.*, 218 App. Div. 427, 213 N. Y. Supp. 442; *Brooklyn Hebrew Home v. Jewish Home*, 117 Misc. 347, 192 N. Y. Supp. 301; *Bush Terminal Co. v. Bush Terminal Trucking Co.*,

not necessary that it be shown that deception and injury has already resulted from the similarity of the names. The court will grant relief when the similarity of names is such that confusion is liable to occur.⁴⁸ The test is whether resemblance is calculated to produce confusion as to identity. Although there is some similarity in names, yet if there are differences which render improbable any confusion or injury, the courts will not interfere.⁴⁹

Injunctive relief may be granted although the two corporations are not organized for trade or commerce.⁵⁰ Benevolent orders,⁵¹ charitable organizations,⁵² historical or patriotic societies,⁵³ may have injunctive relief to restrain another society organized for similar purposes from using a conflicting name.

The time when an injunction shall take effect may be delayed so as to allow an opportunity for a change of the corporate name.⁵⁴

123 Misc. 448, 206 N. Y. Supp. 2; *Vasquez v. Sociedad Mutualista Mexicana, Inc.*, 128 Misc. 699, 219 N. Y. Supp. 257; *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas*, 21 Abb. N. C. 104, 1 N. Y. Supp. 44; *U. S. Mercantile Reporting Company v. U. S. Mercantile Reporting & Collecting Assn.*, 21 Abb. N. C. 115.

48. *German-American Button Co. v. Heymsfeld*, 170 App. Div. 416, 156 N. Y. Supp. 223.

49. *Buffalo Typewriter Exch. v. McGarl*, 240 N. Y. 113; *Eastern Constr. Co. v. Eastern Engineering Co.*, 246 N. Y. 459; *Material Men's, etc., Assn. v. Material Men's Credit Agency*, 191 App. Div. 73, 180 N. Y. Supp. 801. See also, *New York Trust Co. v. New York County Trust Co.*, 125 Misc. 735, 211 N. Y. Supp. 785, affirmed, 212 N. Y. Supp. 882.

50. *Benevolent & Protective Order of Elks v. Improved Benevolent, etc.*, 205 N. Y. 459; *Salvation Army in U. S. v. American Salvation Army*, 135 App. Div. 26, 120 N. Y. Supp. 471, appeal

withdrawn, 200 N. Y. 555; *Metropolitan Teleph. & Teleg. Co. v. Metropolitan Teleph. & Teleg. Co.*, 156 App. Div. 577, 141 N. Y. Supp. 598; *Legal Aid Soc. v. Co-operative Legal Aid Soc.*, 41 Misc. 127, 83 N. Y. Supp. 926; *Grand Lodge v. Johnson*, 107 Misc. 249, 177 N. Y. Supp. 500; *Vasquez v. Sociedad Mutualista Mexicana, Inc.*, 128 Misc. 699, 219 N. Y. Supp. 257.

51. *Benevolent & Protective Order of Elks v. Improved Benevolent, etc.*, 205 N. Y. 459; *Grand Lodge v. Johnson*, 107 Misc. 249, 177 N. Y. Supp. 500.

52. *Salvation Army in U. S. v. American Salvation Army*, 135 App. Div. 26, 120 N. Y. Supp. 471, appeal withdrawn, 200 N. Y. 555; *Brooklyn Hebrew Home v. Jewish Home*, 117 Misc. 347, 192 N. Y. Supp. 301.

53. *Society of War of 1812 v. Society of the War of 1812* of N. Y., 46 App. Div. 568, 62 N. Y. Supp. 355.

54. *U. S. Mercantile Reporting Company v. U. S. Mercantile Reporting & Collecting Assn.*, 21 Abb. N. C. 115.

12. Labels and wrappers.

The labels on certain merchandise, or the wrappers thereof, may be of such a distinctive character that they constitute a trade-mark which is protected against infringement.⁵⁵ A trade union may adopt a label to be placed on the goods manufactured by its members, and the members of the union may bring suit to restrain the unauthorized use of the label or one similar.⁵⁶ An imitation of the containers in which goods are offered for sale may constitute an infringement of a trade-mark.⁵⁷ The use of an impression upon bottles similar to the impression used by the plaintiff and which constitutes a trade-mark, may be forbidden by the courts.⁵⁸ The inquiry in such cases is whether the labels used by the defendant are so similar to those used by the plaintiff as to deceive a purchaser of ordinary caution.⁵⁹ Where a person has marketed a cheese for many years under the label "Philadelphia Cream Cheese," a competitor may be re-

55. *Fleischmann v. Fleischmann*, 7 App. Div. 280, 39 N. Y. Supp. 1002; *Fort Stanwix Canning Co. v. William McKinley Canning Co.*, 49 App. Div. 566, 63 N. Y. Supp. 704; *Luyties Bros. v. Zimmermann & Co.*, 149 App. Div. 542, 133 N. Y. Supp. 997.

Wrappers distinguishable.—An action cannot be maintained to restrain, as an infringement of a trade-mark, the use by another of wrappers or forms of packages similar to those used by the plaintiff, where it appears that the brands, marks and names displayed upon each are amply sufficient to distinguish them in the general market and that nothing has been imitated which could legally be appropriated as a trade-mark. *Brown v. Doscher*, 147 N. Y. 647.

Change of labels.—The plaintiff was a manufacturer of steel pens, which were put up for sale in boxes. Those containing pens of the first quality were labelled No. 303, and those containing pens of an inferior quality were labelled No. 753. The complaint charged that the defendant was in the practice of removing the labels from

the boxes last mentioned, and putting thereon labels numbered 303, closely imitating the plaintiff's labels bearing that number. Held, that this practice of the defendant was a fraud upon the public and the plaintiff, and being a fraud productive of damage, could be restrained by injunction. *Gillott v. Kettle*, 10 Super. Ct. (3 Duer) 624, 12 N. Y. Leg. Obs. 314.

56. *Bulena v. Newman*, 10 Misc. 460, 64 St. Rep. 26, 31 N. Y. Supp. 449; *Strasser v. Moonelis*, 55 Super. Ct. (23 J. & S.) 197, 11 St. Rep. 270, 28 Week. Dig. 68, appeal dismissed 103 N. Y. 611.

57. *Gotham Silk Hosiery Co. v. Reingold*, 213 App. Div. 237, 210 N. Y. Supp. 38; *Gotham Silk Hosiery Co., Inc. v. Reingold*, 223 App. Div. 260, 228 N. Y. Supp. 9; *Allen Mfg. Co. v. Smith*, 224 App. Div. 187, 229 N. Y. Supp. 692.

58. *Schmidt v. Maeurer*, 9 St. Rep. 843, 29 Week. Dig. 184.

59. *Fort Stanwix Canning Co. v. William McKinley Canning Co.*, 49 App. Div. 566, 63 N. Y. Supp. 704.

strained from using a label quite similar in appearance marked "Pennsylvania Cream Cheese."⁶⁰ If the name on the false label is similar to that on the true, an infringement may exist, although the general appearance of the labels is dissimilar.⁶¹

13. Color schemes.

A color scheme, after its adoption and general use, may be protected by injunction.⁶² No one can have a monopoly of a particular color, yet if one puts to use a certain color combination as a distinguishing mark for his goods, no other person may use it on the same class of goods with the intention of marking his goods as those of his competitor and thus deceiving the public.⁶³ The "Yellow" and the "Checker" taxicabs are within the rule, and an injunction will be granted to restrain the unauthorized use of similar dress for other taxicabs.⁶⁴

14. Fraudulent business not protected.

He, who comes into equity, must come with clean hands. A trade-mark adopted by the manufacturer of a product which is a fraud upon the public, will not be protected by a court of equity from infringement.⁶⁵ Or, if the plaintiff sells

60. Phenix Cheese Co. v. Kirp, 176 App. Div. 735, 164 N. Y. Supp. 71.

61. Gaines & Co. v. Leslie, 25 Misc. 20, 54 N. Y. Supp. 421.

62. Gotham Silk Hosiery Co., Inc. v. Reingold, 223 App. Div. 260, 228 N. Y. Supp. 9.

63. Luxor Cab Mfg. Corp. v. Leading Cab Co., 125 Misc. 764, 211 N. Y. Supp. 886, affirmed, 215 App. Div. 798, 213 N. Y. Supp. 847.

64. American Yellow Taxi Operators v. Quinn, 118 Misc. 499, 194 N. Y. Supp. 623; Checker Cab Mfg. Co. v. Sweeney, 119 Misc. 780, 197 N. Y. Supp. 284; Yellow Cab Corp. v. Korjeck, 120 Misc. 499, 198 N. Y. Supp. 871; Buffalo Taxi, etc., Co. v. Howell, 125 Misc. 780; Buffalo Yellow Cab Co. v. Baureis, 132 Misc. 654, 130 N. Y. Supp. 343.

65. Wolfe v. Burke, 56 N. Y. 115;

Hennessy v. Wheeler, 69 N. Y. 271; Kosofsky v. Silbert, 123 Misc. 638, 205 N. Y. Supp. 735; Swift v. Dey, 27 Super. Ct. (4 Rob.) 611. See also, Dale v. Smithson, 12 Abb. Pr. 237. Compare, Fetridge v. Merchant, 4 Abb. Pr. 156.

Pleading.—A defense of this nature must be pleaded in order to be available, unless the facts appearing in the case are such as would authorize the court, on its own motion, to take notice of fraud on the part of the plaintiff. Falk v. American West Indies Trading Co., 71 App. Div. 320, 75 N. Y. Supp. 964, appeal dismissed, 171 N. Y. 679.

Use of word "Patented."—Where a defendant has designedly imitated the labels which the plaintiff used upon packages of yeast, and the offense is a flagrant one, the defendant will not be permitted to take advantage of the

his product under representations which are false and mislead the public, equitable relief may be denied.⁶⁶ For example, one using the name "Hudson Bay Fur Co." will not be accorded injunctive relief, if it appears that the furs he sells were not from Hudson Bay and he had no connection with the original Hudson Bay Company.⁶⁷ A court of equity will not protect the name under which an alcoholic beverage is sold as a medicine and as a specific for certain diseases.⁶⁸ Where upon the dissolution of a partnership, the members agree that neither shall thereafter use a certain trade-name, one violating the agreement cannot restrain another from doing so.⁶⁹

15. Laches.

It is seldom, if ever, that the defendant can show that he has been prejudiced by the delay of the plaintiff in commencing his action for the infringement of a trade-mark, and hence it is said that laches is no defense to such an action.⁷⁰ In some cases, however, the laches of the plaintiff has been considered, with other circumstances, and has had weight in denying equitable relief.⁷¹

16. Damages.

While a court of equity will not move unless it is shown that the acts of a wrongdoer will probably cause injury,⁷² it is not necessary that the plaintiff show that he has already

defense that the plaintiff used upon his labels the word "patented" and thereby himself made a false representation in relation to the property which he sought to protect, unless he both pleads and proves that defense. *Fleischmann v. Fleischmann*, 7 App. Div. 280, 39 N. Y. Supp. 1002.

66. *Falk v. American West Indies Trading Co.*, 71 App. Div. 320, 75 N. Y. Supp. 964, appeal dismissed, 171 N. Y. 679.

67. *Kasofsky v. Silbert*, 123 Misc. 633, 205 N. Y. Supp. 735.

68. *Wolfe v. Burke*, 56 N. Y. 115.

69. *Dworsky v. Herstein*, 207 App. Div. 333, 202 N. Y. Supp. 72.

70. *Goldman & Bros., Inc. v. Goldstein*, 125 Misc. 737, 211 N. Y. Supp. 872; *Luxor Cab Mfg. Corp. v. Leading Cab Co.*, 125 Misc. 764, 211 N. Y. Supp. 886, affirmed, 215 App. Div. 798, 213 N. Y. Supp. 847. See also, *Salvation Army in U. S. v. American Salvation Army*, 122 N. Y. Supp. 97, affirmed, 141 App. Div. 931, 126 N. Y. Supp. 1145.

71. See, *Statson v. Brennen*, 21 App. Div. 552, 48 N. Y. Supp. 552; *Amoskeag Mfg. Co. v. Garner*, 6 Abb. Pr. N. S. 265.

72. *Hotel Claridge Co. v. Rector, Inc.*, 164 App. Div. 185, 148 N. Y. Supp. 748.

actually sustained damages.⁷³ He is entitled to relief upon a showing of similarity between the true and the false trade-marks, and that the imitation threatens an injury to his business. The law does not say that he shall delay his suit until the accrual of damage. If, however, he has sustained pecuniary damage by the wrongful conduct of the defendant, pecuniary relief may be granted in addition to injunctive relief.⁷⁴ The court may grant a reference to ascertain the amount of damages sustained by the plaintiff.⁷⁵ In some cases, the defendant may be required to account to the plaintiff for profits secured through the use of the counterfeit trade-mark; but relief to that extent will not be granted without proof of guilty knowledge or fraudulent intent of the defendant.⁷⁶

17. Parties.

An action for injunction to restrain the infringement of a trade-mark may be maintained by an alien owning the trade-mark, although he resides in a foreign country.⁷⁷ A trade union may maintain such a suit, if the union label has improperly been placed on goods.⁷⁸ One owning and con-

73. *Vulcan v. Myers*, 139 N. Y. 364; *Barrett Chemical Co. v. Stern*, 56 App. Div. 143, 67 N. Y. Supp. 595; *Material Men's Mercantile Assn. v. New York Material Mn's Mercantile Assn.*, 169 App. Div. 843, 155 N. Y. Supp. 706; *German-American Button Co. v. Heymsfeld*, 170 App. Div. 416, 156 N. Y. Supp. 223; *Mark Realty Corp. v. Hirsch*, 180 App. Div. 549, 168 N. Y. Supp. 244; *Lucile, Limited v. Schrier*, 191 App. Div. 567, 181 N. Y. Supp. 694; *Checker Cab Mfg. Co. v. Sweeney*, 119 Misc. 780, 197 N. Y. Supp. 284; *Columbia Grammar School v. Clawson*, 120 Misc. 841, 200 N. Y. Supp. 768; *Bush Terminal Co. v. Bush Terminal Trucking Co.*, 123 Misc. 448, 206 N. Y. Supp. 2; *Kinsley v. Jacoby*, 28 Abb. N. C. 451, 20 N. Y. Supp. 46.

74. *Colman v. Crump*, 70 N. Y. 573; *Taylor v. Carpenter*, 2 Sandf. Ch. 603,

affirmed, 2 Sandf. Ch. 611, 11 Paige 292.

75. **No damage.**—Where there is no evidence that the plaintiff has sustained any damage from the acts of the defendants, or that the defendants have derived any profits from their wrongful acts, there is no basis for the appointment of a referee. *Fishel & Sons, Inc. v. Distinctive Jewelry Co.*, 196 App. Div. 779, 188 N. Y. Supp. 633.

76. *Dickey v. Mutual Film Co.*, 186 App. Div. 701, 174 N. Y. Supp. 784.

77. *Coats v. Holbrook*, 2 Sandf. Ch. 586, 3 N. Y. Leg. Obs. 404; *Taylor v. Carpenter*, 2 Sandf. Ch. 603, affirmed, 2 Sandf. Ch. 611, 11 Paige 292.

78. *Strasser v. Moonelis*, 55 Super. Ct. (23 J. & S.) 197, 11 St. Rep. 270, 28 Week. Dig. 68, appeal dismissed, 108 N. Y. 611.

trolling the manufacture of the goods may have injunctive relief, although another manufactures them.⁷⁹

The action may be maintained against one who is offering the goods for sale although the trade-mark has been placed on the goods by another.⁸⁰ A commission merchant who sells the spurious articles, knowing their character, is liable to a suit to restrain further sale, and may be subjected to the costs of the action.⁸¹ A stockholder having a substantial interest in a corporation and being associated with its active management, may be joined as a party defendant with the corporation.⁸²

18. Circulars, etc., claiming ownership of trade-mark.

Equity does not take jurisdiction of an action to restrain a defendant from publishing circulars claiming ownership of a trade-mark and stating that the plaintiff is infringing the trade-mark.⁸³ Particularly is this true, when there is no proof that the announcements of the defendant are grossly exaggerated or circulated in bad faith.⁸⁴

C. Patents.

The federal courts have exclusive jurisdiction of a suit to restrain the infringement of a patent, and the State courts will not interfere,⁸⁵ although the parties have stipulated not to raise the objection.⁸⁶ But other questions relating to patents may sometimes come before State courts for determination. Thus, an issue as to the existence of a license to use or manufacture a patented article may be decided by a State court.⁸⁷ In a proper case, a licensee may maintain an action for injunction to restrain the owner of the patent from cancelling the license or interfering with his use thereof.⁸⁸ Or the patentee may secure an injunction

79. *Schmid v. Maeurer*, 9 St. Rep. 843, 29 Week. Dig. 184.

80. *Bulina v. Newman*, 10 Misc. 460, 64 St. Rep. 26, 31 N. Y. Supp. 449.

81. *Coats v. Holbrook*, 2 Sandf. Ch. 586, 3 N. Y. Leg. Obs. 404.

82. *Burrow v. Marceau*, 124 App. Div. 665, 109 N. Y. Supp. 105.

83. *Mauger v. Dick*, 55 How. Pr. 132.

84. *Sonneborn Sons, Inc. v. Storm Waterproofing Corp.*, 129 Misc. 796, 222 N. Y. Supp. 624.

85. *Dudley v. Mayhew*, 3 N. Y. 9; *Comerma Co. v. Comerma*, 182 App. Div. 576, 169 N. Y. Supp. 884, affirmed, 225 N. Y. 676.

86. *Dudley v. Mayhew*, 3 N. Y. 9.

87. *Waterman v. Shipman*, 130 N. Y. 301.

88. *Koopman v. Lachman*, 203 App. Div. 354, 196 N. Y. Supp. 595; *Safety Electric Construction Co. v. Creamer*, 84 Hun 570, 33 N. Y. Supp. 411.

Cancellation of license.—Where the

restraining the licensee from committing a violation of their agreement.⁸⁹ Questions arising out of royalties may present a controversy cognizable by a State court.⁹⁰

An invention not patented, or a secret process not subject to patent, may receive protection in the State courts. An inventor may have, irrespective of letters patent, an exclusive property in his invention, until by publication it becomes the property of the public.⁹¹ The whole world is at liberty to discover by fair means a secret process whereby an article is manufactured, but if the process is discovered by unfair means, the courts may extend injunctive relief.⁹²

D. Literary property.

The jurisdiction of State courts in matters relating to copyright infringement is similar to the patent situation.⁹³

decision of a court of equity is necessary to the cancellation of a contract conferring a license to make and sell a patented article, the state courts have jurisdiction to enjoin the manufacture and sale of the article pending the litigation, if the facts warrant such relief. But if a party to such contract is entitled to annul it without a decision of the court and does so, or if he annul the same by reason of a breach by the other party, the latter by continuing to manufacture and sell the article is an infringer, and the federal courts have exclusive jurisdiction. And even where the decree of a court of equity is essential to the cancellation of such contract, an injunction restraining the licensee from manufacturing and selling the article pending the decree of rescission will not be granted where the state court can issue no permanent injunction, and it is not shown that the defendant is irresponsible, or that the plaintiff cannot obtain adequate relief by an accounting for the profits, and the injunction will do greater damage to the defendant than to the plaintiff by preventing the execution of profitable contracts. *Schalkenbach v. National Ventilating Co.*, 129 App. Div. 389, 113 N. Y. Supp. 352.

89. *Tipograph Patented Sweat Band Corp. v. Rappaport*, 220 App. Div. 122, 220 N. Y. Supp. 620.

90. *Norfolk & New Brunswick Hosiery Co. v. Arnold*, 143 N. Y. 265.

91. *Tabor v. Hoffman*, 118 N. Y. 30; *Westcott Chuck Co. v. Oneida National Chuck Co.*, 122 App. Div. 260, 106 N. Y. Supp. 1016; *Hammer v. Barnes*, 26 How. Pr. 174.

92. *Tabor v. Hoffman*, 118 N. Y. 30; *Tabor v. Hoffman*, 41 Hun 5, affirmed, 118 N. Y. 30; *Eastman Kodak Co. v. Reinchenboch*, 79 Hun 183, 29 N. Y. Supp. 1143.

93. *Schenck v. Underhill*, 205 App. Div. 162, 199 N. Y. Supp. 606.

Pictorial news service.—A motion for an injunction *pendente lite* should be granted in favor of a domestic corporation, engaged in furnishing photographic and pictorial news service and also photographic news to banks and other financial institutions by means which it has devised, against another corporation which was formed by one of its former employees and which copied plaintiff's methods, first, in the use of headings for ordinary news service which simulated those of plaintiff and especially in the use of wire towers and other structural representations,

Although a book or other publication may not be copyrighted, the author or publisher may have a literary property therein and court may restrain an imitating publication.⁹⁴ A "comic strip" may thus be protected against imitation.⁹⁵ The principle which interdicts unfair competition in trade will protect a publisher who has imparted to his books peculiar characteristics, which enable the public to distinguish them from books published by others and containing the same literary matter, against the copying of the characteristics, though the copyright on the literary matter has expired.⁹⁶ The title of a drama may not be copyrighted, but after its use another cannot present a play with the same or substantially the same name; and injunction is an appropriate remedy.⁹⁷

One who undertakes to produce a play written by another, under an agreement providing that no changes or alterations in the play or additions thereto shall be made without the consent of the author, will be restrained by injunction from making unauthorized changes and modifications in the text and structural arrangement thereof.⁹⁸

The author of a literary work or composition has at common law a right to its first publication; he may determine whether it shall be published at all, and if published, when, where and by whom and in what form. This exclusive right

which produce the effect of plaintiff's headings; second, in the use of contract slips or blanks which in color, language, shape and arrangement are copies of those used by plaintiff. *Elliott Service Co. v. Dispatch, etc., Co.*, 197 App. Div. 615, 189 N. Y. Supp. 459.

94. *Dutton & Co. v. Cupples*, 117 App. Div. 172, 102 N. Y. Supp. 309.

Co-owners of drama.—Where several persons as tenants in common have an undivided interest in the manuscript and production rights of a play one of the tenants has as good a right to use the play or to license third persons to produce it as the others. No one of them can assert a superior right in a court of equity in the absence of a contract modifying their rights as tenants in common. Hence, one owning

an undivided one-half interest in a play, but claiming no right of sole ownership or rights of production, cannot maintain a suit to enjoin the production of the play without her individual consent, for the defendants may have acted under the authority of the plaintiff's co-owner or may themselves be co-owners. *Nillson v. Lawrence*, 148 App. Div. 678, 133 N. Y. Supp. 293.

95. *Fisher v. Star Co.*, 231 N. Y. 414.

96. *Fisher v. Star Co.*, 231 N. Y. 414. See also, *Munro v. Tousey*, 129 N. Y. 38.

97. *Selig Polyscope Co. v. Unicorn Film S. Corp.*, 163 N. Y. Supp. 62.

98. *Royle v. Dillingham*, 53 Misc. 383, 104 N. Y. Supp. 783.

is confined to the first publication. When once published it is dedicated to the public and the author has not at common law any exclusive right to multiply copies of it or to control the subsequent issue of copies by others.⁹⁹ This right to first printing and publication may be transferred to another; and after a transfer the author cannot copyright it or grant licenses to others to print or publish it.¹

An author may give a license to another for the dramatization or other use of literary property, and controversies over the license may properly be determined in State courts.² Although an author has given a license, he still retains a sufficient interest in the subject matter as to justify an action by him against a third party pirating the material.³

E. Monopolies.

At common law monopolistic agreements in restraint of trade were against public policy and void. Section 340 of the General Business Law incorporates the principle in statutory form. Section 342 of such law permits an action by the Attorney-General to restrain the making or consummation of such an illegal combination. But independently of this statutory remedy, an individual who is directly affected by an illegal monopoly may have a remedy in an equitable action of injunction.⁴ There is also a remedy in an action at

99. *Kortlander v. Bradford*, 116 Misc. 664, 190 N. Y. Supp. 311; *French v. Maguire*, 55 How. Pr. 471.

1. *Kortlander v. Bradford*, 116 Misc. 664, 190 N. Y. Supp. 311.

2. *Widmer v. Greene*, 56 How. Pr. 91.

License to print book.—A party to whom a publishing company has sold the right to print and sell for three years from plates, maps, charts, and illustrations owned by the company a certain book, the contract providing that the publishing company will not make a similar agreement with any other parties nor sell the work itself from the plates, except in a manner specified in the contract, is entitled to an injunction against such company and against a person with whom it has entered into a contract, under which the plates of the book in ques-

tion were sold to such person without any limitation of the right to use them, restraining the sale of the book in a way not permitted by the first mentioned contract. *Standard American Pub. Co. v. Methodist Book Concern*, 33 App. Div. 409, 54 N. Y. Supp. 55.

3. *Fleron v. Lackaye*, 14 N. Y. Supp. 292.

4. *Straus v. American Publishers Assn.*, 85 App. Div. 446, 83 N. Y. Supp. 271, affirmed, 177 N. Y. 474; *Brescia Constr. Co. v. Stone Masons' Contractors' Assn.*, 195 App. Div. 647, 197 N. Y. Supp. 77; *Langley v. Furman*, 132 Misc. 726, 230 N. Y. Supp. 538. See also, *Park v. National Wholesale Druggists' Assn.*, 175 N. Y. 1; *Locker v. American Tobacco Co.*, 121 App. Div. 443, 106 N. Y. Supp. 115, affirmed, 195 N. Y. 565.

law for such damages as have been sustained.⁵ Members of a combination, who, after such combination has been declared unlawful by the Court of Appeals, for the purpose of carrying out the objects of such illegal combination, spy upon another person's business, thereby seriously injuring it, will be enjoined from persisting in such espionage.⁶ The extent of the relief that will be granted is within the discretion of the court, and hence it is proper for a defendant to set up in his answer any facts happening either before or after the commencement of the action, which may bear upon or affect the extent to which injunctive relief will be granted.⁷

F. Public utility operating without necessary preliminaries.

A public utility which is duly authorized to serve a community may have equitable relief by way of injunction to prevent competition by one who has not been authorized to do business in that territory.⁸ The State, through the Attorney-General, can maintain an action to restrain a corporation from exercising powers not granted to it or from exercising powers granted to it without complying with the conditions precedent to such exercise; but the power of the State is not so exclusive as to bar as an action by an individual or corporation specially injured by the unauthorized acts.⁹ A municipality owning its waterworks may maintain an action to restrain an unauthorized water company from supplying the inhabitants.¹⁰ The proprietor of a bus line who has not secured the required consents of the local municipal officials and of the Public Service Commission, may be restrained from its operations at the suit of a com-

5. *Rourke v. Elk Drug Co.*, 75 App. Div. 145, 77 N. Y. Supp. 373.

6. *Straus v. American Publishers' Assn.* 92 App. Div. 350, 86 N. Y. Supp. 1091.

7. *Straus v. American Publishers' Assn.*, 103 App. Div. 277, 92 N. Y. Supp. 1052.

8. *Fulton Light, Heat & P. Co., v. Seneca River Power Co.*, 119 Misc. 729, 197 N. Y. Supp. 319, affirmed on opinion below, 206 App. Div. 731, 199 N. Y. Supp. 923; *Hudson Valley R. Co. v.*

United Transp. Co., 127 Misc. 841, 217 N. Y. Supp. 614.

9. *Fulton Light, Heat & P. Co., v. Seneca River Power Co.*, 119 Misc. 729, 197 N. Y. Supp. 319, affirmed on opinion below, 206 App. Div. 731, 199 N. Y. Supp. 923. Compare, *North Shore Electric Light, etc., Co. v. Port Jefferson Elec. Lt. Co.*, 151 App. Div. 63, 135 N. Y. Supp. 824.

10. *City of Rochester v. Rochester, etc., Water Co.*, 189 N. Y. 323.

peting bus line,¹¹ or railroad.¹² The unauthorized operation of a bus line by a municipality may be restrained.¹³ The courts, as a matter of discretion, may refuse injunctive relief, if the plaintiff has an adequate remedy by application to the Commission;¹⁴ but, if the Commission has wrongfully decided the question, it is not necessary to make a direct attack upon that determination, by certiorari or otherwise, before seeking relief from a court of equity.¹⁵

G. Exclusiveness of franchise.

An injunction may be granted to restrain competition with an exclusive franchise. Thus, in the early history of the State, the Legislature assumed to grant to Robert L. Livingston and Robert Fulton the exclusive right of navigation of all waters within the State with boats moved by fire and steam; and the courts granted injunctions to restrain others from such form of navigation.¹⁶ Finally, however, the grant was held void as in conflict with the interstate commerce clause of the federal constitution.¹⁷ The principle involved is applicable to exclusive franchises granted to turnpike, bridge, or ferry companies,¹⁸ although the court,

11. *Darling v. Darling*, 118 Misc. 817, 194 N. Y. Supp. 897.

Interstate commerce.—The state statutes relative to bus lines may not apply to corporations engaged in interstate commerce. See *Garrison v. Paramount Bus Corp.*, 223 App. Div. 75, 227 N. Y. Supp. 510.

12. *New York, etc., R. Co. v. Griffin*, 201 App. Div. 733, 195 N. Y. Supp. 112, reversed on other grounds, 235 N. Y. 174; *United Tract. Co. v. Smith*, 115 Misc. 73, 187 N. Y. Supp. 377; *Hudson Valley R. Co. v. United Transp. Co.*, 127 Misc. 841, 217 N. Y. Supp. 614.

Answer in action by street railway company to restrain jitneys. *International R. Co. v. Jaggard*, 204 App. Div. 67, 197 N. Y. Supp. 384.

13. *Brooklyn City R. Co. v. Whalen*, 191 App. Div. 737, 182 N. Y. Supp. 282, affirmed, 229 N. Y. 570; *Huff v. New York City*, 202 App. Div. 425, 195 N. Y. Supp. 257.

14. *Fulton Light, Heat & P. Co. v. Seneca River Power Co.*, 123 Misc. 585, 205 N. Y. Supp. 821. See also, *Fulton Light, Heat & P. Co. v. Seneca River Power Co.*, 119 Misc. 729, 197 N. Y. Supp. 319, affirmed on opinion below, 206 App. Div. 731, 199 N. Y. Supp. 923.

15. *Hudson Valley R. Co. v. United Transp. Co.*, 127 Misc. 841, 217 N. Y. Supp. 614.

16. *Livingston v. Ogden*, 4 Johns. Ch. 48; *Ogden v. Gibbons*, 4 Johns. Ch. 174. See also, *Livingston v. Gibbons*, 4 Johns. Ch. 571.

17. *North River Steamboat Co. v. Livingston*, 3 Cow. 713.

18. *Newburgh, etc., Turnp. Road Co. v. Miller*, 5 Johns. Ch. 101.

The city of New York may maintain a suit in equity to enjoin a ferry company from using boats to transport persons and property without authority, although such act is made a misdemeanor by section 870 of the Penal

in its discretion may refuse injunctive relief, if the plaintiff is not exercising his franchise rights.¹⁹ If, however, a franchise is not exclusive, the Legislature may grant a similar right to a competing company, and the holder of the earlier franchise can not object to the ensuing competition.²⁰ The Legislature is now prohibited from granting exclusive franchises,²¹ though the early franchises are protected under the clause of the federal constitution forbidding the impairment of contract obligations.

ARTICLE VIII.

LABOR UNIONS, STRIKES, BOYCOTTS, ETC.

A. Strike.

The right of workingmen to strike cannot be questioned. In the absence of contract obligations affecting the situation, they may quit their employments, either singly or in concert, either with or without a cause or reason which may be thought reasonable. A court of equity will not interfere with the exercise of this right, although the employer may suffer irreparable damages.²² Hence, an injunction will not

Law. The city may maintain such suit although one of the terminals of the ferry is in the state of New Jersey. *New York v. New Jersey & S. I. Ferry Co.*, 173 App. Div. 496, 159 N. Y. Supp. 434.

19. *City of New York v. Starin*, 106 N. Y. 1.

20. *Skaneateles Water Works Co. v. Village of Skaneateles*, 161 N. Y. 154; *Oswego Falls Bridge Co. v. Fish*, 1 Barb. Ch. 547.

21. N. Y. Constitution, Art. III, section 18.

22. *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185; *Auburn Draying Co. v. Wardell*, 178 App. Div. 270, 165 N. Y. Supp. 469, affirmed, 227 N. Y. 1; *Reardon, Inc. v. Caton*, 189 App. Div. 501, 178 N. Y. Supp. 713; *Bossert v. United Brotherhood of Carpenters, etc.*, 77 Misc. 592, 137 N. Y. Supp. 321; *Walter A. Wood*

Mowing & R. Machine Co. v. Toohey, 114 Misc. 185, 186 N. Y. Supp. 95; *Grand Shoe Co. v. Children's Shoe Workers' Union*, 187 N. Y. Supp. 886; *Yates Hotel Co. v. Meyers*, 195 N. Y. Supp. 558. "A workman may leave his work for any cause whatever. He need make no defense, give no explanations. Whether in good or bad faith, whether with malice or without, no one can question his action. What one man may do, two may do or a dozen, so long as they act independently. If, however, any action taken is concerted; if it is planned to produce some result, it is subject to control. As always, what is done, if legal, must be to effect some lawful result by lawful means, but both a result and a means lawful in the case of an individual may be unlawful if the joint action of a number." *Exchange Bakery & Restaurant v. Rufkin*, 245 N. Y. 260.

be granted to restrain persons from organizing a strike.²³ Labor has the right to organize for the purpose of securing better conditions of wages, hours for work and general relations with their employers.²⁴ A labor organization will not be enjoined from calling or organizing a strike for a lawful purpose.²⁵ But, where a labor union threatens to call a strike of its members, not primarily for the lawful benefit or advantage of the union, or of its members, but for an unlawful purpose prohibited by law, or for a purpose which contravenes public policy, to the injury of another, its threatened action may be enjoined.²⁶ The right to strike for the purpose of obtaining an increase in wages, is recognized in section 582 of the Penal Law; ²⁷ but a strike for the primary purpose of preventing other workingmen from exercising their trades is condemned by section 580 of the Penal Law.²⁸ The members of a trade union may lawfully refuse to work with persons not belonging to the union, and a threat to strike if the non-union workingmen are not discharged, where such action is primarily for their own benefit, is not unlawful and affords no ground for injunctive relief.²⁹ But they cannot enter into an unlawful conspiracy to injure the employer by preventing him from continuing his business and hiring such employees as he finds necessary and to have the work done under his direction.³⁰

23. *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185. "The defendants should not be restrained from 'organizing a strike against the said defendant printing company.' An employee who has not bound himself to his master by contract cannot be bound to him by law. Therefore, he may quit his work. If he may quit his work absolutely, he may quit because the conditions thereof are not to his liking, and he is free to say that he will not take up that work until the conditions are to his liking. What one may lawfully do alone, he may do in concert, and hence a strike is not *per se* unlawful." *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185.

24. *Yates Hotel Co. v. Meyers*, 195 N. Y. Supp. 558.

25. *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279.

26. *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279.

27. *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279.

28. *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279.

29. *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279.

30. *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279.

B. Injury to employer's property.

While the courts have sustained the right of labor to strike, and to conduct the strike in a lawful manner, an unlawful interference with the employer's property and business will not be permitted.³¹ A court of equity will not hesitate to enjoin an invasion of the property rights of an employer. The courts will not interfere with a "peaceful" strike, but a strike accompanied by violence to property rights presents a case for equitable interference.³² Unlawful attacks upon intangible property, such as business, goodwill or trade, will not be permitted.³³ The court is not deprived of the power to grant injunctive relief merely because the defendants are guilty of criminal acts and could be prosecuted in a criminal court.³⁴ The tendency of the courts is to decide the cases on the issue of whether an unlawful conspiracy to injure the plaintiff's business has been shown.

C. Breach of contract.

The courts ordinarily sustain the validity of a contract which is the result of "collective bargaining." A contract between an association of operators and a labor union or an association of unions may be specifically enforced by a court of equity.³⁵ If during its term one party threatens a repudiation, an injunction may be granted. Parol evidence is admissible to fix the time of the duration of the contract, when the contract is silent on that point.³⁶ The laborers through their union may thus have relief in equity, there being no adequate remedy at law for any damages they may sustain.³⁷ It is no defense that on account of changed eco-

31. *Arnheim v. Hillman*, 198 App. Div. 88, 189 N. Y. Supp. 369; *Michaels v. Hillman*, 112 Misc. 395, 183 N. Y. Supp. 195; *Schwartz, etc., Inc. v. Hillman*, 115 Misc. 61, 189 N. Y. Supp. 21; *Traub Amusement Co. v. Mosher*, 127 Misc. 335, 215 N. Y. Supp. 397; *Bolivian Panama Hat Co. v. Finkelstein*, 127 Misc. 337, 215 N. Y. Supp. 399; *Davis v. Zimmerman*, 91 Hun 489, 71 St. Rep. 385, 36 N. Y. Supp. 303; *New York Central Iron Works v. Brennan*, 105 N. Y. Supp. 865.

32. *Grand Shoe Co. v. Children's Shoe Workers' Union*, 187 N. Y. Supp. 886.

33. *Grand Shoe Co. v. Children's Shoe Workers' Union*, 187 N. Y. Supp. 886.

34. *Davis v. Zimmerman*, 91 Hun 489, 36 N. Y. Supp. 303; *New York Central Iron Works v. Brennan*, 105 N. Y. Supp. 865.

35. *Schlesinger v. Quinto*, 201 App. Div. 487, 194 N. Y. Supp. 401; *Goldman v. Cohen*, 222 App. Div. 631, 226 N. Y. Supp. 820.

36. *Meltzer v. Kaminer*, 131 Misc. 813, 227 N. Y. Supp. 459.

37. *Schlesinger v. Quinto*, 201 App. Div. 487, 194 N. Y. Supp. 401; *Goldman v. Cohen*, 222 App. Div. 631, 226 N. Y. Supp. 820. Compare, *Stone*

conomic conditions the terms of the agreement have become burdensome, and the business no longer prospers.³⁸ The remedy in equity is mutual. That is to say, in a proper case, the employers may maintain a suit in equity to enjoin a union from repudiating its contract obligations.³⁹ Moreover, injunctive relief may be granted as against a third person or a labor organization which is wrongfully interfering with the contracts of employment between an operator and his employees,⁴⁰ though possibly an attempt by a union to induce workmen to terminate their contracts of employments will not be restrained, unless the motive or intent of the union is wrongful.⁴¹ Especially is this true when the individual laborers are not bound by the contract.⁴²

One party to the controversy who has violated the contract in a material provision, cannot compel performance by his adversary. The rules relating to the performance of contracts, as well as the equitable maxim that, "He who comes into equity, must come with clean hands," forbid equitable relief under such circumstances.⁴³

D. Interference with workmen.

While recognizing the right of employees to work or to quit their employment, the courts equally sustain the right of the employer to select his employees, without regard to their affiliations with trade unions, and to discharge those

Cleaning, etc., *Union v. Russell*, 38 Misc. 513, 77 N. Y. Supp. 1049.

38. *Schlesinger v. Quinto*, 201 App. Div. 487, 194 N. Y. Supp. 401.

39. *Grassi Contracting Co. v. Bennett*, 174 App. Div. 244, 160 N. Y. Supp. 279; *Best Service Wet Wash Laundry Co. v. Dickson*, 121 Misc. 416, 201 N. Y. Supp. 173; *Meltzer v. Kammer*, 131 Misc. 813, 227 N. Y. Supp. 459.

40. *A. L. Reed Co. v. Whiteman*, 238 N. Y. 545; *Interborough Rapid Transit Co. v. Lavin*, 247 N. Y. 65; *Beattie v. Callanan*, 82 App. Div. 7, 81 N. Y. Supp. 413; *Cook v. Wilson*, 108 Misc. 433, 178 N. Y. Supp. 463; *Third Ave. R. Co. v. Shea*, 109 Misc. 18, 179 N. Y. Supp. 43, affirmed, 191 App. Div. 949,

181 N. Y. Supp. 956; *Best Service Wet Wash Laundry Co. v. Dickson*, 121 Misc. 416, 201 N. Y. Supp. 173; *Vail-Ballou Press v. Casey*, 125 Misc. 689, 212 N. Y. Supp. 113; *Pleaters & Stitchers Association, Inc. v. Taft*, 131 Misc. 506, 227 N. Y. Supp. 185. See also, *Interborough Rapid Transit Co. v. Green*, 131 Misc. 682, 227 N. Y. Supp. 258. Compare, *Rogers v. Evarts*, 17 N. Y. Supp. 264.

41. See *Exchange Bakery & Restaurant, Inc. v. Rifkin*, 245 N. Y. 260.

42. *Interborough Rapid Transit Co. v. Lavin*, 247 N. Y. 65.

43. *Moran v. Lasette*, 221 App. Div. 118, 223 N. Y. Supp. 283; *Segenfeld v. Friedman*, 117 Misc. 731, 193 N. Y. Supp. 128.

whose employment is no longer desired.⁴⁴ An unlawful interference with the employer's right in this respect may be restrained by injunction.⁴⁵ The strikers may within reasonable limitations "picket" the premises of the employer, and may by peaceable means endeavor to dissuade other employees from continuing their work;⁴⁶ but they must not assault, harass, abuse, threaten or intimidate laborers desiring to continue their employments. An injunction may appropriately be granted to restrain such unlawful acts.⁴⁷ A workman thus remaining at work, or a membership corporation composed of such men, can secure equitable relief against interference by a trade union.⁴⁸

E. Picketing.

Peaceful picketing is sustained by the courts as a proper procedure in the conduct of a strike.⁴⁹ That is to say, a

44. *Garside v. Hollywood*, 88 Misc. 311, 150 N. Y. Supp. 647; *Traub Amusement Co. v. Macker*, 127 Misc. 335, 215 N. Y. Supp. 397; *Sinsheimer v. United Garment Workers*, 77 Hun 215, 59 St. Rep. 503, 28 N. Y. Supp. 321.

45. *Coons v. Chrystie*, 24 Misc. 296, 53 N. Y. Supp. 668; *New York Central Iron Works v. Brennan*, 105 N. Y. Supp. 865.

46. *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185; *Walter A. Wood Mowing & R. Machine Co. v. Toohey*, 114 Misc. 185, 186 N. Y. Supp. 95; *Rogers v. Evarts*, 17 N. Y. Supp. 264.

47. *Herzog v. Fitzgerald*, 74 App. Div. 110, 77 N. Y. Supp. 366; *Arnheim v. Hillman*, 198 App. Div. 98, 189 N. Y. Supp. 369; *W. P. Davis Mach. Co. v. Robinson*, 41 Misc. 329, 84 N. Y. Supp. 837; *Russell v. Stampers, etc., Union No. 22*, 57 Misc. 96, 107 N. Y. Supp. 303; *Walter A. Wood Mowing & R. Machine Co. v. Toohey*, 114 Misc. 185, 186 N. Y. Supp. 95; *Pre Catelan, Inc. v. International Federation of Workers, etc.*, 114 Misc. 662, 188 N. Y. Supp. 29; *Pleaters & Stitchers Association v. Taft*, 131 Misc. 506, 227

N. Y. Supp. 185; *Johnston Harvester Co. v. Meinhardt*, 9 Abb. N. Cas. 393, 60 How. Pr. 168, affirmed, 24 Hun 489; *Davis v. Zimmerman*, 91 Hun 489, 71 St. Rep. 385, 36 N. Y. Supp. 303; *New York Central Iron Works v. Brennan*, 105 N. Y. Supp. 865.

48. *United Cloak & Suit Designers Mut. Aid Assn. v. Sigman*, 218 App. Div. 367, 218 N. Y. Supp. 483.

49. *Exchange Bakery & Res., Inc. v. Rifkin*, 245 N. Y. 260; *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185; *Federal Hats, Inc. v. Golden*, 223 App. Div. 701, 226 N. Y. Supp. 747; *Krebs v. Rosenstein*, 31 Misc. 661, 66 N. Y. Supp. 42, affirmed, 56 App. Div. 619, 67 N. Y. Supp. 385; *Foster v. Retail Clerks' International Protective Assn.*, 39 Misc. 48, 78 N. Y. Supp. 860; *Butterick Pub. Co. v. Typographical Union*, 50 Misc. 1, 100 N. Y. Supp. 292; *Searle Mfg. Co. v. Terry*, 56 Misc. 265, 106 N. Y. Supp. 438; *Jones v. Maher*, 62 Misc. 388, 116 N. Y. Supp. 180, affirmed, 141 App. Div. 919, 125 N. Y. Supp. 1126; *Heitkamper v. Hoffman*, 99 Misc. 543, 164 N. Y. Supp. 533; *Walter A. Wood Mowing & R. Machine Co. v. Toohey*, 114 Misc. 185, 186 N. Y. Supp. 95;

reasonable number of the strikers may assemble at the location of the difficulty, and they may by peaceful means persuade other workers to join the strikers.⁵⁰ They may properly keep the employer's place of business under observation.⁵¹ The courts will permit them to carry signs or distribute circulars properly stating their grievances.⁵²

But picketing, although it is permitted, is not regarded with favor,⁵³ and when it is unreasonable or is accompanied with wrongful acts, a court of equity will interfere.⁵⁴ Thus, the picketing strikers may be enjoined from acts of violence,

Public Baking Co. v. Stern, 127 Misc. 229, 215 N. Y. Supp. 537; *N. & R. Theaters v. Basson*, 127 Misc. 271, 215 N. Y. Supp. 157; *Manker v. Bankers C. & W. International Union*, 129 Misc. 516, 221 N. Y. Supp. 106; *Jaekel v. Kaufman*, 187 N. Y. Supp. 889; *Levy v. Rosenstein*, 66 N. Y. Supp. 101, affirmed, 56 App. Div. 618, 67 N. Y. Supp. 630; *Yates Hotel Co. v. Meyers*, 195 N. Y. Supp. 558; *Albee & Co. v. Arci*, 201 N. Y. Supp. 172.

50. *Exchange Bakery & Restaurant v. Rufkin*, 245 N. Y. 260; *Krebs v. Rosenstein*, 31 Misc. 661, 66 N. Y. Supp. 42, affirmed, 56 App. Div. 619, 67 N. Y. Supp. 385; *Butterick Pub. Co. v. Typographical Union*, 50 Misc. 1, 100 N. Y. Supp. 292; *Berg Auto Trunk & Specialty Co. v. Wiener*, 121 Misc. 796, 200 N. Y. Supp. 745; *Yates Hotel Co. v. Meyers*, 195 N. Y. Supp. 558.

51. *Searle Mfg. Co. v. Terry*, 56 Misc. 265, 106 N. Y. Supp. 438.

52. *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260; *Federal Hats v. Golden*, 223 App. Div. 701, 226 N. Y. Supp. 747; *Foster v. Retail Clerks' International Protective Assn.*, 39 Misc. 48, 78 N. Y. Supp. 860; *Manker v. Bankers C. & W. International Union*, 159 Misc. 516, 221 N. Y. Supp. 106.

53. "Picketing as a concomitant of a lawful strike is so essentially an act of interference with individual and public rights that courts have hesi-

tated in saying that any sort of picketing is lawful. It suggests aggression. In it there is always an element of unlawful interference with the personal and property rights of others. Demarcation between peaceful persuasion, on the one hand, and trespass and intimidation on the other is not easily followed." *Yates Hotel Co. v. Meyers*, 195 N. Y. Supp. 558. "Peaceful picketing, so called, approximates so closely to wrongful interference with the constitutional guaranty for individual security of life and property that it can only be done under strictest limitation." *Yates Hotel Co. v. Meyers*, 195 N. Y. Supp. 558.

54. *Mills v. U. S. Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185; *Arnheim v. Hillman*, 198 App. Div. 88, 189 N. Y. Supp. 369; *Foster v. Retail Clerks' International Protective Assn.*, 39 Misc. 48, 78 N. Y. Supp. 860; *Butterick Pub. Co. v. Typographical Union*, 50 Misc. 1, 100 N. Y. Supp. 292; *Jones v. Maher*, 62 Misc. 388, 116 N. Y. Supp. 180, affirmed, 141 App. Div. 919, 125 N. Y. Supp. 1126; *Garside v. Hollywood*, 88 Misc. 311, 150 N. Y. Supp. 647; *Michaels v. Hillman*, 112 Misc. 395, 183 N. Y. Supp. 195; *Pre Catelan, Inc. v. International Federation of Workers, etc.*, 114 Misc. 662, 188 N. Y. Supp. 29; *Edelman, Edelman & Berrie v. Retail Grocery & Dairy Clerks' Union*, 119 Misc. 618, 198 N. Y. Supp. 17; *Jaekel v. Kaufman*, 187 N. Y. Supp. 889; *Benito Rovira Co.*,

or interference with the other employees.⁵⁵ They may be restrained from addressing the customers of the employer, making false statement as his goods, intimidating them, or otherwise interfering with his business dealings with them.⁵⁶ The carrying of signs, or the distribution of circulars, containing untrue and libellous statements, may be prohibited.⁵⁷

Picketing, even though ostensibly peaceable, may not be employed when its purpose is in effect a malicious and wanton interference with another's business or vocation.⁵⁸ Some of the earlier cases sustain a rule that picketing without a strike is illegal and can be restrained,⁵⁹ but the latest declaration of the Court of Appeals is that, "Picketing without a strike is no more unlawful than a strike without-picketing."⁶⁰ Picketing designed to compel an employer to

Inc. v. Yampolsky, 187 N. Y. Supp. 894; *Yates Hotel Co. v. Meyers*, 195 N. Y. Supp. 558.

55. *Arnheim v. Hillman*, 198 App. Div. 88, 189 N. Y. Supp. 369; *Rentner v. Sigman*, 216 App. Div. 407, 215 N. Y. Supp. 323; *Jones v. Maher*, 62 Misc. 388, 116 N. Y. Supp. 180, affirmed, 141 App. Div. 919, 125 N. Y. Supp. 1126; *Stuyvesant Lunch, etc., Corp. v. Reiner*, 110 Misc. 357, 181 N. Y. Supp. 212, affirmed, 192 App. Div. 951, 182 N. Y. Supp. 953; *Michaels v. Hillman*, 112 Misc. 395, 183 N. Y. Supp. 195; *Berg Auto Trunk & Specialty Co. v. Wiener*, 121 Misc. 796, 200 N. Y. Supp. 745; *Bellin v. Millinery Union*, 127 Misc. 53, 216 N. Y. Supp. 68; *Daitch & Co., Inc. v. Retail Grocery & D. C. Union*, 129 Misc. 343, 221 N. Y. Supp. 446; *Grand Shoe Co. v. Children's Shoe Workers' Union*, 187 N. Y. Supp. 886.

56. *Yablonowitz v. Korn*, 205 App. Div. 440, 199 N. Y. Supp. 769; *Foster v. Retail Clerks' International Protective Assn.*, 39 Misc. 48, 78 N. Y. Supp. 860; *W. P. Davis Mach. Co. v. Robinson*, 41 Misc. 329, 84 N. Y. Supp. 837; *Heitkamper v. Hoffman*, 99 Misc. 543, 164 N. Y. Supp. 533; *Cook v. Wilson*, 108 Misc. 438, 178 N. Y. Supp. 463; *Stuyvesant, etc., Corp. v. Reiner*, 110 Misc. 357, 181 N. Y. Supp. 212,

affirmed, 192 App. Div. 951, 182 N. Y. Supp. 953.

57. *Wilner v. Bless*, 243 N. Y. 544.

58. *National Protective Assn. v. Cumming*, 170 N. Y. 321; *Bossert v. Dhuy*, 221 N. Y. 342; *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260; *Stuyvesant, etc., Corp. v. Reiner*, 110 Misc. 357, 181 N. Y. Supp. 212, affirmed, 192 App. Div. 951, 182 N. Y. Supp. 953; *Traub Amusement Co. v. Macker*, 127 Misc. 335, 215 N. Y. Supp. 397; *Welinsky v. Hillman*, 185 N. Y. Supp. 257; *Benito Rovira Co. v. Yampolsky*, 187 N. Y. Supp. 894.

59. *Daitch & Co. v. Cohen*, 218 App. Div. 80, 217 N. Y. Supp. 817; *Stuyvesant, etc., Corp. v. Reiner*, 110 Misc. 357, 181 N. Y. Supp. 212, affirmed, 192 App. Div. 951, 182 N. Y. Supp. 953; *Cushman's Sons, Inc. v. Amalgamated, etc., Bakers*, 127 Misc. 152, 215 N. Y. Supp. 401; *Traub Amusement Co. v. Macker*, 127 Misc. 335, 215 N. Y. Supp. 397; *Bolivian Panama Hat Co. v. Finkelstein*, 127 Misc. 337, 215 N. Y. Supp. 399; *Daitch & Co., Inc. v. Retail Grocery & D. C. Union*, 129 Misc. 343, 221 N. Y. Supp. 446.

60. *Exchange Bakery & Res., Inc. v. Rifkin*, 245 N. Y. 260. See also, *Public Baking Co. v. Stern*, 127 Misc. 229, 215 N. Y. Supp. 537; *N. & R. Theaters*,

hire more workmen than he feels the conditions warrant, is illegal and may be restrained.⁶¹

When the picketing is conducted in an unlawful manner, or for an unlawful purpose, *all* picketing is sometimes forbidden.⁶² In other cases the courts have restricted the injunction to the unlawful features of the picketing.⁶³ The number and location of the pickets may be regulated.⁶⁴

F. Boycott.

The "boycott," while not entirely unlawful, is not commended by the courts. It may or may not be restrained by the courts, depending upon accompanying acts and the good faith and motives of the workingmen.⁶⁵ A labor union, acting in good faith for the betterment of its members, may adopt a rule that its members shall not work with non-union laborers,⁶⁶ or that its members shall not work upon materials furnished by a non-union shop.⁶⁷ A union is within

Inc. v. Basson, 127 Misc. 271, 215 N. Y. Supp. 157.

61. Benito Rovira Co. v. Yampolsky, 187 N. Y. Supp. 894.

62. Schwarcz v. International Ladies, etc., Union, 68 Misc. 528, 124 N. Y. Supp. 968.

63. Berg Auto Trunk & Specialty Co. v. Wiener, 121 Misc. 796, 200 N. Y. Supp. 745.

64. Bellin v. Millinery Union, 127 Misc. 53, 216 N. Y. Supp. 63; Berg Auto Trunk & Specialty Co. v. Weiner, 121 Misc. 796, 200 N. Y. Supp. 745.

65. Bossert v. Dhuy, 221 N. Y. 342; Mills v. U. S. Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185; Reardon, Inc. v. Caton, 189 App. Div. 501, 178 N. Y. Supp. 713; Butterick Pub. Co. v. Typographical Union, 50 Misc. 1, 100 N. Y. Supp. 292; Albro J. Newton Co. v. Erickson, 70 Misc. 291, 126 N. Y. Supp. 949, affirmed, 144 App. Div. 939, 129 N. Y. Supp. 1111; Heitkamper v. Hoffman, 99 Misc. 543, 164 N. Y. Supp. 533. See also, Reardon v. International Mercantile Marine Co., 189 App. Div. 515, 178 N. Y. Supp. 722.

Meaning of term.—"The verb 'to boycott' does not necessarily signify

that the persons participating therein employ violence, intimidation or other unlawful coercive means, but it may be correctly used in the sense of the act of a combination in refusing to have business dealings with another until he removes or ameliorates conditions which are deemed inimical to the welfare of the members of the combination, or some of them, or until he grants concessions which are deemed to make for that purpose. Such a combination may be formed and held together by argument, persuasion, entreaty or by the 'touch of nature,' and may accomplish its purpose without violence or other unlawful means, *i.e.* simply by abstention; and hence it cannot be said that 'to boycott' is to offend the law." Mills v. U. S. Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185.

66. Bossert v. Dhuy, 221 N. Y. 342; Mills v. U. S. Printing Co., 99 App. Div. 605, 91 N. Y. Supp. 185; Tallman v. Gaillard, 27 Misc. 114, 57 N. Y. Supp. 419; Reform Club v. Laborers' Union Protective Soc., 29 Misc. 247, 6 N. Y. Supp. 388.

67. Bossert v. Dhuy, 221 N. Y. 342;

its legal rights in publishing and distributing a circular, soliciting its sympathizers and friends to withdraw their patronage or to refrain from patronizing an employer resisting its demands.⁶⁸ Such a course of conduct, although sustained when followed in good faith, becomes illegal and a subject of equitable interference when done maliciously with the intent of injuring the business of an employer who does not accede to unwarranted demands of the organization.⁶⁹ A general boycott of an employer, whereby the laborers, not only refuse to do business with him, but by threats induce others to cease business relations with him, the purpose of the boycott being to compel the employer to accept the demands of the union, or to ruin his business if he refuses, may constitute a conspiracy of which equity will take cognizance and restrain.⁷⁰

G. Responsibility of union.

Where the officers and agents of a labor union, acting within the scope of their authority as such, call and carry on a strike with the intention of using unlawful means and do use such means, the labor union is liable for damages, and an injunction may be granted against it.⁷¹ But the unlawful acts of one or more of the workers during a strike do not *ipso facto* bind the union. To have that effect, there should be proof that the union promoted or ratified the acts of which complaint is made.⁷² The organization may be liable,

Bossert v. United Brotherhood of Carpenters, etc., 77 Misc. 592, 137 N. Y. Supp. 321.

68. Cohen v. United Garment Workers, 35 Misc. 748, 72 N. Y. Supp. 341; **Butterick Pub. Co. v. Typographical Union**, 50 Misc. 1, 100 N. Y. Supp. 292; **Heitkamper v. Hoffman**, 99 Misc. 543, 164 N. Y. Supp. 533.

69. Bossert v. Dhuy, 221 N. Y. 342; **Matthews v. Shankland**, 25 Misc. 604, 56 N. Y. Supp. 123; **Schlang v. Ladies' Waist Makers' Union**, 67 Misc. 221, 124 N. Y. Supp. 289; **Albro J. Newton Co. v. Erickson**, 70 Misc. 291, 126 N. Y. Supp. 949, affirmed, 144 App. Div. 939, 129 N. Y. Supp. 1111; **Justin Seubert, Inc. v. Ruff**, 98 Misc. 402, 164 N. Y. Supp. 552.

70. Auburn Draying Co. v. Wardell, 227 N. Y. 1; **Matthews v. Shankland**, 25 Misc. 604, 56 N. Y. Supp. 123; **Justin Seubert, Inc. v. Ruff**, 98 Misc. 402, 164 N. Y. Supp. 552; **Burgess Bros. Co. v. Stewart**, 114 Misc. 673, 187 N. Y. Supp. 873.

71. Arnheim v. Hillman, 198 App. Div. 88, 189 N. Y. Supp. 369; **Michaels v. Hillman**, 112 Misc. 395, 183 N. Y. Supp. 195.

72. Piermont v. Schlessinger, 196 App. Div. 658, 188 N. Y. Supp. 35; **Searle Mfg. Co. v. Terry**, 56 Misc. 265, 106 N. Y. Supp. 438; **Russell & Sons v. Stampers, etc., Union**, 57 Misc. 96, 107 N. Y. Supp. 303.

if, after knowledge of the unlawful acts of its representatives, it maintains and supports the strike.⁷³

An unincorporated labor union is an association within sections 13 of the General Associations, and an action for injunction against it may be maintained against the president or treasurer thereof.⁷⁴ If process is served on such an officer, an injunction order granted in the action is binding upon every member thereof.⁷⁵

H. Injury must be anticipated.

The basis for injunctive action in labor disputes is the probability of threatened and unjustified interference with the rights of the plaintiff.⁷⁶ This is true although the public has an interest in the outcome.⁷⁷ In labor difficulties, as in other cases in which application is made for injunctive relief, the court will not act upon proof of an isolated act of trespass, the repetition of which is not expected.⁷⁸ Where the damage has already been done, the remedy is by a criminal prosecution or by a recovery of damages at law.⁷⁹

73. *Jones v. Maher*, 62 Misc. 388, 116 N. Y. Supp. 180, affirmed, 141 App. Div. 919, 125 N. Y. Supp. 1126.

74. *Jones v. Maher*, 62 Misc. 388, 116 N. Y. Supp. 180, affirmed, 141 App. Div. 919, 125 N. Y. Supp. 1126; *Heitkamper v. Hoffman*, 99 Misc. 543, 164 N. Y. Supp. 533.

Service of process on person stating he was officer of union.—An affidavit of service of an order to show cause why an injunction should not issue against the defendant, restraining it from picketing in front of premises occupied by plaintiffs, which recites that service of a copy of said order was made on a person who said he was an officer, is not a sufficient compliance with the direction of the court so as to confer jurisdiction, although the order directed a copy thereof to be served upon the person picketing, and thereafter, but before the return day, on any officer of the defendant union. Section 13 of the General Associations Law permits an action to be brought against the president or

treasurer of such an association, but service of any summons or order must be made in the manner prescribed by statute. Accordingly, plaintiffs are not entitled to an injunction restraining the defendant from picketing where defendant's affidavit shows that the person whom plaintiffs served as president of the union neither was president at the time the action was commenced nor was served with the restraining order, and that the person actually served is not and never has been an officer of the association. *Salitra v. Borson*, 127 Misc. 173, 215 N. Y. Supp. 332.

75. *Russell v. Stampers, etc., Union*, No. 22, 57 Misc. 96, 107 N. Y. Supp. 303.

76. *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260.

77. *Interborough Rapid Transit Co. v. Lavin*, 247 N. Y. 65.

78. *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260.

79. *Exchange Bakery & Restaurant v. Rifkin*, 245 N. Y. 260.

If the strike is settled before the case comes to trial, the court may refuse injunctive relief.⁸⁰

ARTICLE IX.

PROTECTION OF CIVIL RIGHTS.

A. Right of privacy.

1. Civil Rights Law, § 50. Right of privacy.

A person, firm or corporation that uses for advertising purposes, or for the purpose of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

2. Civil Rights Law, § 51. Action for injunction and for damages.

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use, and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment, specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed.

3. Constitutionality of statute.

The statutory right and remedies given for an invasion of privacy by sections 50 and 51 of the Civil Rights Law is constitutional. The statute is justified, not only for the protection of the rights of the individual, but also from considerations of public welfare.⁸¹ The statute is not retroactive, and hence does not affect previously acquired rights or the obligation of contracts made prior to its enactment.⁸²

4. Rule prior to enactment of statute.

Prior to the enactment of Chapter 132 of the Laws of 1903, which was substantially similar to the existing statutes,

80. *Reynolds v. Everett*, 144 N. Y. & Co., 126 App. Div. 650, 111 N. Y. 189. Supp. 86.

81. *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223; *Wyatt v. McCreery* 82. *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223.

the right of privacy as a legal doctrine enforceable in equity did not exist to prevent the use of a portrait for advertising purposes.⁸³

5. Application of statute.

The statute is in part penal, and it should be construed accordingly.⁸⁴ In case of doubt, the statute is construed in favor of the defendant.⁸⁵ It enforces the right of a person to control the use of his name or portrait by others so far as advertising or trade purposes are concerned;⁸⁶ but it does not prohibit its use for other purposes.⁸⁷ The statute may be violated by a moving picture assuming to represent the plaintiff;⁸⁸ but the making and showing of "news reels" depicting a person taking part in an occurrence of public interest is not forbidden by the statute.⁸⁹ Similarly, the use

83. *Schuyler v. Curtis*, 147 N. Y. 434; *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538; *Binns v. Vitagraph Co.*, 210 N. Y. 51; *Kunz v. Bosselman*, 131 App. Div. 288, 115 N. Y. Supp. 650; *Corliss v. E. W. Walker Co.*, 30 Abb. N. C. 372; *Murray v. Gast Lithographic & Eng. Co.*, 31 Abb. N. C. 266, 8 Misc. 36, 58 St. Rep. 811, 28 N. Y. Supp. 271. Compare, *Marks v. Jaffa*, 6 Misc. 290, 26 N. Y. Supp. 908.

84. *Binns v. Vitagraph Co.*, 210 N. Y. 51.

85. *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. Supp. 752.

86. *Riddle v. McFadden*, 201 N. Y. 215; *Binns v. Vitagraph Co.*, 210 N. Y. 51; *Kunz v. Bosselman*, 131 App. Div. 288, 115 N. Y. Supp. 650; *Almind v. Sea Beach Co.*, 157 App. Div. 230, 141 N. Y. Supp. 842; *Loftus v. Greenwich Lithographing Co.*, 192 App. Div. 251, 82 N. Y. Supp. 428; *Eliot v. Jones*, 66 Misc. 95, 120 N. Y. Supp. 989.

Survival.—The cause of action is personal in its nature, and does not survive the death of the person to whom the statute gives the right of action. *Wyatt v. Hall's Portrait*

Studio, 71 Misc. 199, 123 N. Y. Supp. 247.

Surname only.—The word "name" as used in the statute means a person's full name. *Pfaudler v. Pfaudler Co.*, 114 Misc. 477, 186 N. Y. Supp. 725.

Street railways.—Where in a suit involving the use of plaintiff's picture for alleged "advertising purposes or for the purposes of trade" in violation of section 50 of the Civil Rights Law, it appears that the picture of the plaintiff and her child was used by the defendant without the plaintiff's written consent for the purpose of instructing intending passengers on defendant's cars how to enter and alight therefrom with a greater degree of safety, an injunction restraining the use thereof should be granted. *Almind v. Sea Beach Co.*, 157 App. Div. 230, 141 N. Y. Supp. 842.

87. *Binns v. Vitagraph Co.*, 210 N. Y. 51; *Colyer v. Fox Publishing Co.*, 162 App. Div. 297, 146 N. Y. Supp. 999; *Jeffries v. N. Y. Evening Journal Pub. Co.*, 67 Misc. 570, 124 N. Y. Supp. 780.

88. *Binns v. Vitagraph Co.*, 210 N. Y. 51.

89. *Humiston v. Universal Film Mfg.*

of one's name and portrait as a matter of news or item of interest, in a periodical or newspaper, although without his consent, furnishes no cause of action.⁹⁰ A film showing a factory does not violate the statute although the plaintiff's name is on the building.⁹¹ The statute does not prohibit one from writing the biography of a well known individual, although without his consent.⁹²

If there has been some change in the photograph before its use, there may arise a question whether the picture is that of the plaintiff; but the change in the portrait does not defeat the remedy of one actually portrayed.⁹³

6. Oral consent; estoppel.

The statute prescribes a written consent; and hence an oral consent for the use of one name is ordinarily no defense to an application for an injunction.⁹⁴ Nor is it any defense that the plaintiff's name and picture frequently appear with her consent in daily newspapers.⁹⁵ Such matters, however, may have a material bearing on the question of damages.⁹⁶ Nominal damages of six cents is proper when the plaintiff has orally consented.⁹⁷ Although there is no written consent, there may exist a question of estoppel.⁹⁸ Thus, where

Co., 189 App. Div. 467, 178 N. Y. Supp. 752. See also, *Humiston v. Universal Film Co.*, 101 Misc. 3, 167 N. Y. Supp. 98, affirmed, 182 App. Div. 882, 168 N. Y. Supp. 1112.

90. *Colyer v. Fox Publishing Co.*, 162 App. Div. 297, 146 N. Y. Supp. 999.

91. *Merle v. Sociological Research Film Corp.*, 166 App. Div. 376, 152 N. Y. Supp. 829.

92. *Jeffries v. N. Y. Evening Journal Pub. Co.*, 67 Misc. 570, 124 N. Y. Supp. 780.

93. *Loftus v. Greenwich Lithographing Co.*, 192 App. Div. 251, 182 N. Y. Supp. 423.

94. *Humiston v. Universal Film Co.*, 101 Misc. 3, 167 N. Y. Supp. 98, affirmed, 182 App. Div. 882, 168 N. Y. Supp. 1112.

Pleading.—The plaintiff must allege and prove that the portrait was used without his written consent, and the plaintiff should not be required to re-

ply to a separate defense by way of avoidance alleging that the plaintiff gave a written consent to the use of his portrait for advertising purposes. *Porter v. American Tobacco Co.*, 140 App. Div. 871, 125 N. Y. Supp. 710.

95. *Humiston v. Universal Film Co.*, 101 Misc. 3, 167 N. Y. Supp. 98, affirmed, 182 App. Div. 882, 168 N. Y. Supp. 1112.

96. *Harris v. Gossard Co.*, 194 App. Div. 688, 185 N. Y. Supp. 861; *Humiston v. Universal Film Co.*, 101 Misc. 3, 167 N. Y. Supp. 98, affirmed, 182 App. Div. 882, 168 N. Y. Supp. 1112.

97. *Harris v. Gossard Co.*, 194 App. Div. 688, 185 N. Y. Supp. 861.

98. **Transfer of business.**—Where a person, who has been doing business under his own name, transfers the business together with its good will to a company incorporated under his individual name, he is deemed to have given the corporation the right to use

one who is in another's employ voluntarily poses for a portrait to be used in his master's business, he may not, after the latter has incurred expenses in the use thereof to build up his business, maintain an action upon the termination of the employment to restrain the further use of the portrait for advertising purposes.⁹⁹

7. Damages.

The statute allows compensatory damages, and also, under some circumstances in the discretion of the jury, permits exemplary damages. If the plaintiff claims that he is libeled in connection with the use of his picture, the recovery therefor must be in the same action.¹ The action for libel and for damages for a violation of the statute can be joined in the same complaint.²

B. Libel and slander.

The equity tribunals of England once exercised a limited power to enjoin the publication of a libel, but only when the falsity of the publication was clearly shown.³ In this State courts of equity have always refused equitable protection against a wrong of this character.⁴ An action for damages is deemed an adequate remedy for the wrong. The remedy at law might well be inadequate if the publisher was financially irresponsible, yet the courts will not interfere. The freedom of the press must be maintained.⁵ It matters not that the attacks are against one personally or against his business or against the products he markets.⁶ But, in con-

his name. *White v. William J. White*, 160 App. Div. 709, 145 N. Y. Supp. 743.

99. *Wendell v. Conduit Mach. Co.*, 74 Misc. 201, 133 N. Y. Supp. 758.

1. *Binns v. Vitagraph Co.*, 210 N. Y. 51.

2. *D'Altomonte v. New York Herald Co.*, 154 App. Div. 453, 139 N. Y. Supp. 200, modified on other grounds, 208 N. Y. 596.

3. *Greene v. U. S. Dealers' Protective Assn. Agency*, 39 Hun 300; *Brandreth v. Lance*, 8 Paige 24.

4. *Marlin Firearms Co. v. Shields*, 171 N. Y. 384; *DeWick v. Dobson*,

18 App. Div. 399, 46 N. Y. Supp. 390; *Owen v. Partridge*, 40 Misc. 415, 82 N. Y. Supp. 248; *Old Investors & Traders Corp. v. Jenkins*, 133 Misc. 213; *Wood v. Marvine*, 10 Super. Ct. (3 Duer) 674; *Mauger v. Deik*, 55 How. Pr. 132; *Greene v. U. S. Dealers' Protective Assn. Agency*, 39 Hun 300; *Brandreth v. Lance*, 8 Paige 24. Compare, *Croft v. Richardson*, 59 How. Pr. 356.

5. *DeWick v. Dobson*, 18 App. Div. 399, 46 N. Y. Supp. 390.

6. *Marlin Firearms Co. v. Shields*, 171 N. Y. 384.

junction with other circumstances, libellous statements, when aimed at a business competitor, may constitute unfair competition, and may be enjoined as such.⁷

C. Burial rights.

Equity assumes jurisdiction of a controversy as to the place of burial of a deceased, and also any removal of the body that his widow or the next of kin may seek. The primary right to control the burial is with the widow of the deceased rather than with the next of kin, and equity may, if necessary, enforce the right by injunction to prevent interference.⁸ Yet the rights of the widow are not necessarily supreme.⁹ Charge of a dead body is regarded as a trust, which is subject to regulation by a court of equity to the extent of securing it a proper burial and restraining interference after interment.¹⁰ After the burial, other matters than the primary right of the widow are to be considered. Then must also be weighed the wishes of the deceased, the interests of the public, and the rights and feelings of those entitled to be heard by reason of relationship or association.¹¹ A benevolent discretion, giving heed to all those promptings and emotions that men and women hold for sacred in the disposition of their dead, must render judgment as it appraises the worth of the competing forces.¹² An equitable action for injunction properly brings the controversy before the court, but an injunction *pendente lite* should not be granted except as necessary to preserve the *statu quo*.¹³ The primary right of the widow in matters of burial does not exclude the right of the next of kin to appeal to a court of equity to restrain a desecration of the grave.¹⁴

An unauthorized trespass upon a cemetery lot may be restrained by a court of equity. The removal of a monument may be prohibited by injunction,¹⁵ and an action to that

7. See, *supra*, VII-A, Unfair competition.—In general.

8. *Yome v. Gorman*, 242 N. Y. 395; *Stiles v. Stiles*, 113 Misc. 576, 185 N. Y. Supp. 53; *Mitchell v. Thorne*, 57 Hun 405, 10 N. Y. Supp. 682, affirmed, 134 N. Y. 536.

9. *Yome v. Gorman*, 242 N. Y. 395.

10. *Stiles v. Stiles*, 113 Misc. 576, 185 N. Y. Supp. 53.

11. *Yome v. Gorman*, 242 N. Y. 395.

12. *Yome v. Gorman*, 242 N. Y. 395.

13. *Yome v. Gorman*, 242 N. Y. 395.

14. *Mitchell v. Thorne*, 57 Hun 405, 10 N. Y. Supp. 682, affirmed, 134 N. Y. 536.

15. *Mitchell v. Thorne*, 134 N. Y. 536.

end may be maintained by a relative who has no title to any part of the cemetery plot.¹⁶ Any member of the family of the deceased can maintain a suit to enjoin interference with the fence surrounding the plot.¹⁷

D. Interference with mail.

An injunction may properly be granted to restrain an unauthorized interference with one's mail. Thus, if one sells a business with the right to use his name, but subsequently the seller is receiving and opening the mail to which the purchaser is entitled, a proper case for injunctive relief is presented.¹⁸ If, on account of the similarity of names, it is difficult to separate the letters to which each is entitled, and neither should be allowed to receive and open the confidential letters of the other, the court may appoint a referee to examine the mail and distribute it to its proper destination.¹⁹

E. Exclusion from public place.

If one is wrongfully excluded from a public place, it is held that his sole right of redress is under sections 40 and 41 of the Civil Rights Law, prescribing a penalty for a violation of the statute; and an injunction cannot be granted to restrain threatened violations.²⁰

F. Matrimonial status.

Where a husband has secured in a foreign jurisdiction a divorce the validity of which is denied in this State, and he thereafter goes through a marriage ceremony with another woman, his lawful wife may have a judgment declaring the marital status of the parties, and enjoining the husband and second wife from holding themselves out to be husband and wife, from holding out that the plaintiff is divorced, restraining and prohibiting the second wife from using the

16. *Mitchell v. Thorne*, 134 N. Y. 536.

17. *Lay v. Carter*, 151 N. Y. Supp. 1081.

18. *Dr. David Kennedy Corp. v. Kennedy*, 165 N. Y. 353. See also, *Kilmer v. Kilmer*, 175 App. Div. 670, 162 N. Y. Supp. 617, affirmed without opinion,

225 N. Y. 705. See *Kennedy v. Dr. David Kennedy Corp.*, 32 Misc. 480, 66 N. Y. Supp. 225.

19. *Dr. David Kennedy Corp. v. Kennedy*, 165 N. Y. 353.

20. *Woollcott v. Shubert*, 169 App. Div. 194, 154 N. Y. Supp. 643.

husband's name, and enjoining the husband and second wife from going through any further marriage ceremonies.²¹

ARTICLE X.

PROCEDURE.

A. Limitation of action; laches.

The Civil Practice Act does not specifically prescribe the time within which an action for an injunction must be brought and hence it may be commenced, as permitted by section 53 of the Civil Practice Act, within ten years after the accrual of the cause of action. If damages are sought in addition to injunctive relief, only those damages accruing within six years of the commencement of the suit, are ordinarily considered.²²

The cause of action involved in a suit for an injunction is frequently of a continuing nature, and never becomes barred by the statute of limitations. As a general rule the only trespasses of which courts of equity take cognizance are those which are continuous in character; and if they are such, there is a fresh trespass each day, and the limitation never commences to run.²³ The same may be said of a nuisance, for the cause of action for a continuous nuisance is revived each day.²⁴ A delay of twenty years, however, may result in a loss of the *right* by adverse possession or prescription.²⁵

A delay in starting suit, though it falls short of furnishing a defense by way of the statute of limitations, may constitute laches and induce the court to deny equitable relief on that ground.²⁶ One will not be permitted to enjoin a violation of a building covenant if he has been guilty of

21. *Baumann v. Baumann*, 132 Misc. 217, 228 N. Y. Supp. 537.

22. *White v. Miller*, 78 Misc. 428, 129 N. Y. Supp. 660.

23. *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132; *Wright v. Syracuse R. Co.*, 49 Hun 445, 3 N. Y. Supp. 480, 23 St. Rep. 78, affirmed without opinion, 124 N. Y. 668; *Knox v. Metropolitan Elevated R. Co.*, 58 Hun 517, 12 N. Y. Supp. 848, 36 St. Rep. 2, affirmed without opinion, 128 N. Y. 625.

24. *Yonkers Bd. of Health v. Coppitt*, 140 N. Y. 12; *Mills v. Hall*, 9 Wend. 315.

25. *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132; *Knox v. Metropolitan Elevated R. Co.*, 58 Hun 517, 12 N. Y. Supp. 848, 36 St. Rep. 2, affirmed without opinion, 128 N. Y. 625.

26. *Campbell v. Seaman*, 63 N. Y. 568; *Knoth v. Manhattan R. Co.*, 187 N. Y. 243; *Shaw v. Rochester, Syracuse, etc., R. Co.*, 131 App. Div. 528,

laches in bringing the proposed violation to the attention of the court.²⁷ The laches of the plaintiff may be considered as bearing on the discretion of the court.²⁸ Laches can rarely be urged as a defense, where the plaintiff is seeking to enforce legal rights as distinguished from those rights which are purely equitable.²⁹ Nor, as a general rule, will a delay in commencing suit result in a denial of equitable relief, unless the delay has prejudiced the defendant.³⁰ It is said that the injunction will not be refused for laches unless there has arisen a case of estoppel.³¹ In trade-mark cases, it is seldom that laches will operate as a defense.³²

B. Parties.

1. Plaintiff.

An action for an injunction may be brought by a person who is specially injured by the unlawful acts of which complaint is made.³³ One specially injured by a public nuisance may maintain the action.³⁴ But one whose rights are not threatened by a proposed unlawful act will not be permitted to maintain suit.³⁵ A private corporation,³⁶ or a munici-

115 N. Y. Supp. 1026; *Danner v. New York, etc., R. Co.*, 152 App. Div. 405, 137 N. Y. Supp. 270, affirmed, 213 N. Y. 117; *Cherrington v. South Brooklyn R. Co.*, 180 App. Div. 659, 168 N. Y. Supp. 322; *Mattlage v. N. Y. Elevated R. Co.*, 67 How. Pr. 232; *Vick v. City of Rochester*, 46 Hun 607, 13 St. Rep. 31; *Fries v. Parr*, 139 N. Y. Supp. 220.

27. See, *supra*, II-J-12, Restrictive covenant as to use of property.

28. *Knoth v. Manhattan R. Co.*, 187 N. Y. 243.

29. *White v. Miller*, 78 Misc. 428, 139 N. Y. Supp. 660.

30. *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Ackerman v. True*, 71 App. Div. 143, 75 N. Y. Supp. 695, reversed on other grounds, 175 N. Y. 353; *Brandt v. Voorhies*, 177 App. Div. 896, 163 N. Y. Supp. 1110; *Brown-Brand Realty Co. v. Saks & Co.*, 126 Misc. 336, 214 N. Y. Supp. 230, affirmed, 218 N. Y. Supp. 706; *Vick v.*

City of Rochester, 46 Hun 607, 13 St. Rep. 31.

31. *Brandt v. Voorhies*, 177 App. Div. 896, 163 N. Y. Supp. 1110; *White v. Miller*, 71 Misc. 428, 139 N. Y. Supp. 660; *Hydraulic Power Co. v. Pettibone Cataract Co.*, 112 Misc. 528, 183 N. Y. Supp. 373, affirmed, 193 App. Div. 644, 191 N. Y. Supp. 12.

32. See, *supra*, VII-B-15, Trade-marks and Trade-names.

33. A remainderman may maintain a suit to restrain the operation of an elevated railroad, notwithstanding an intervening life estate. *Thompson v. Manhattan R. Co.*, 130 N. Y. 360.

34. *Gillespie v. Forrest*, 18 Hun 110.

35. **Landlord or tenant.**—Where premises supplied by water are in the exclusive possession of a tenant, an action to enjoin the wrongful discontinuance of water to the premises, must be maintained by the tenant, not the owner. *Brass v. Rathbone*, 153 N. Y. 435.

36. A foreign corporation, in a proper

pality,³⁷ may have relief in an action for an injunction. A building covenant restricting the use of certain premises may, as a general rule, be enforced by the successors of the grantor, and may be enforced against the assignees of the covenantor.³⁸ Two or more persons similarly situated and similarly injured may in some cases be joined as plaintiffs. Thus, in an action to enjoin the maintenance of a nuisance several persons who are damaged thereby may join as plaintiffs, although they own distinct properties.³⁹ Similarly several owners along a stream may join in an action to restrain the diversion or pollution of the water.⁴⁰ But it has been held that two or more persons owning several parcels cannot join as plaintiffs to restrain a trespass which extends over the entire tract.⁴¹

2. Necessary defendants.

All persons should be joined as defendants whose presence is necessary for the rendering of a final judgment.⁴² Where the maker of a note brings an action to restrain the collection thereof, the payee of the note, as well as the holder thereof and one holding the collateral for the note, should be joined as defendants.⁴³ Where one claims to be an equitable assignee of an insurance policy and brings an action against the company to restrain the payment of the loss to

case, may invoke the jurisdiction of the courts of this state. *Direct U. S. Cable Co. v. Dominion Tel. Co.*, 84 N. Y. 153.

37. City of New York.—Under section 1614 of the Greater New York Charter all suits by or against the city must be brought in the corporate name of "The City of New York;" therefore, the complaint in a suit in equity, brought by the president of one of the boroughs of said city to remove an encroachment upon one of its public streets, is demurrable on the ground that plaintiff has not legal capacity to maintain the action. *Pounds v. Lee Ave. Theatre*, 84 Misc. 623, 147 N. Y. Supp. 815.

A board of health of a village may maintain a suit to restrain a nuisance which is harmful to the public health.

Board of Health, v. Casey, 3 N. Y. Supp. 399, 18 St. Rep. 251.

A county may not maintain an action to restrain the misappropriation of the funds of the state. *County of Albany v. Hooker*, 204 N. Y. 1.

38. See, *supra*, II-J-13, 14, Restrictive covenants as to use of property.

39. *Burghen v. Erie R. Co.*, 123 App. Div. 204, 108 N. Y. Supp. 311; *Brady v. Weeks*, 3 Barb. 157; *Murray v. Hay*, 1 Barb. Ch. 59; *Blont v. Hay*, 4 Sandf. Ch. 362.

40. *Strobel v. Kerr Salt Co.*, 164 N. Y. 303; *Emery v. Erskine*, 66 Barb. 9.

41. *Moran v. Lydecker*, 27 Hun 582, 11 Abb. N. C. 298.

42. *Bailey v. Inglee*, 2 Paige 278.

43. *Inman v. Corwin*, 9 N. Y. Supp. 195, 30 St. Rep. 618.

the insured or to another person claiming to be the owner thereof, such owner is a necessary party.⁴⁴ In an action to restrain the issuance of bonds in aid of a railroad company, the railroad is a necessary party.⁴⁵ A municipality through whose streets a street railway company is illegally constructing a line is not a necessary party to a suit by an abutting owner against the company.⁴⁶ One who is operating the railway under a lease should be brought in as a party defendant.⁴⁷

3. Proper defendants.

Where the plaintiff shows that he will be entitled to final relief against any person, he may properly join such person as a party defendant.⁴⁸ Several persons contributing to the pollution of a stream may be joined as defendants, and the court may apportion the damages among the defendants according to the injury which each has inflicted.⁴⁹ Or the plaintiff may proceed against but one of the persons who are contaminating the water supply.⁵⁰ In an action to restrain an employee from working for a competitor in violation of his contract of employment, the competitor may properly be joined as a party defendant.⁵¹ Those who are merely servants or agents of the defendant should not ordinarily be made parties.⁵²

4. Municipality.

Injunctive relief may be granted as against a municipal corporation in the same manner as against an individual or private corporation.⁵³ Statutory provisions requiring the presentation of a claim against a municipality before the commencement of a suit thereon, do not generally apply to

44. *Mahr v. Norwich Fire Ins. Society*, 127 N. Y. 452.

45. *People ex rel. Hess v. Clark*, 53 Barb. 171.

46. *Beekman v. Third Ave. R. Co.*, 13 App. Div. 279, 43 N. Y. Supp. 174, affirmed, 153 N. Y. 144.

47. *Farley v. Manhattan Ry. Co.*, 117 App. Div. 248, 102 N. Y. Supp. 330.

48. *Hammer v. Barnes*, 26 How. Pr. 174.

49. *Warren v. Parkhurst*, 105 App.

Div. 239, 93 N. Y. Supp. 1009, affirmed, 186 N. Y. 45.

50. *Western New York Water Co. v. Niagara Falls*, 91 Misc. 73, 154 N. Y. Supp. 1046, affirmed, 176 App. Div. 944, 162 N. Y. Supp. 1149.

51. See, *supra*, II-G Contract for personal services.

52. *Grover v. Swain*, 29 Hun 454.

53. *Samons v. City of Gloversville*, 175 N. Y. 346; *Sponenburg v. Gloversville*, 96 App. Div. 157, 89 N. Y. Supp.

equitable suits.⁵⁴ This, however, depends upon the language of the particular statute, and under the charters of some cities, the presentation of a claim is a prerequisite.⁵⁵

5. State of New York and its officials.

The State cannot be sued without its consent, and it never has consented to the maintenance of an action in the Supreme Court against it for injunctive relief. A State officer acting within the scope of his duties, ordinarily, is likewise immune from a suit for injunctive relief.⁵⁶ But an officer or agent who is not acting within the scope of his duties, acts as an individual, and his official position affords him no protection against suit.⁵⁷

C. Pleadings.

1. Complaint.

The complaint must allege the facts showing the wrongful acts of the defendant, and the right of the plaintiff to complain of those acts. It must show that the plaintiff is damaged, or about to be damaged, by the acts of the defendant.⁵⁸ It should show the necessity for equitable intervention.⁵⁹ It should state satisfactory grounds for injunctive relief.⁶⁰ A bare allegation that the plaintiff will sustain irreparable damage if equitable relief is not allowed, is not sufficient;⁶¹ the facts on which that conclusion is based must be stated.⁶²

19; *Beach v. City of Elmira*, 22 Hun 158.

54. *Samons v. City of Gloversville*, 175 N. Y. 346; *Lamay v. City of Fulton*, 48 Misc. 153, 96 N. Y. Supp. 701.

55. *Squaw Island Freight & Terminal Co., Inc. v. City of Buffalo*, 133 Misc. 64, 231 N. Y. Supp. 139.

56. *Hutchinson v. Skinner*, 21 Misc. 729, 49 N. Y. Supp. 360; *Thompson v. Comrs. of Canal Fund*, 2 Abb. Pr. 248.

57. *Wright v. Shanahan*, 149 N. Y. 495; *Litchfield v. Bond*, 186 N. Y. 66; *Saratoga State Waters Corp. v. Pratt*, 227 N. Y. 429; *United Tract. Co. v. Ferguson Contracting Co.*, 117 App. Div. 305, 102 N. Y. Supp. 190; *Ryder v. Pyrke*, 130 Misc. 505, 224 N. Y. Supp. 289.

58. *O'Reilly v. New York El. R. Co.*,

148 N. Y. 347; *Castle v. Bell Tel. Co.*, 30 Misc. 38, 61 N. Y. Supp. 743, affirmed, 49 App. Div. 437, 63 N. Y. Supp. 482.

59. *Jackson v. Bunnell*, 113 N. Y. 216.

60. *Hogel v. Warner*, 59 N. Y. Supp. 786.

61. *Brass v. Rathbone*, 153 N. Y. 435; *New Hartford Canning Co. v. Bulifant*, 78 App. Div. 6, 78 N. Y. Supp. 951; *Goldman v. Corn*, 111 App. Div. 674, 97 N. Y. Supp. 926; *Kienle v. Gretsche Realty Co.*, 133 App. Div. 391, 117 N. Y. Supp. 500; *Glascoe v. Willard*, 44 Misc. 166, 89 N. Y. Supp. 791; *Zazula v. Friedlander*, 181 N. Y. Supp. 673.

62. *New Hartford Canning Co. v. Bulifant*, 78 App. Div. 6, 78 N. Y.

In a case which is not ordinarily cognizant in a court of equity, the plaintiff should allege the facts to show that he has no adequate remedy at law.⁶³ But, if the controversy is one which is within the recognized bounds of equity jurisdiction, the existence of an adequate remedy at law is a matter of defense to be alleged by the defendant.⁶⁴ In such a case, however, an allegation in the complaint that there is no adequate remedy at law and a denial of such allegation in the answer, sufficiently raises the issue.⁶⁵ When the case is purely one of equitable cognizance, an alleged defense that there is an adequate remedy at law, may be insufficient as a matter of law.⁶⁶

The prayer for relief must ask for injunctive relief.⁶⁷ The prayer should specify the acts sought to be enjoined, and not merely ask for an injunction.⁶⁸

A complaint alleging facts sufficient to bring the case within the jurisdiction of equity is not defective because as a matter of discretion the court may feel impelled to deny equitable relief.⁶⁹ That question will be determined after hearing the proofs of the parties, and will not be decided upon a motion for judgment.

2. Joinder of causes of action.

In the same complaint, a plaintiff may seek injunctive relief to prevent anticipated injuries, and also damages for past injuries. If the damages are merely incidental, a complaint along these lines contains but one cause of action.⁷⁰ Although the damages claimed are so substantial that they cannot be said to be merely incidental to the equitable action, they may nevertheless be allowed in the same action.⁷¹ In

Supp. 951; *Glascoe v. Willard*, 44 Misc. 166, 89 N. Y. Supp. 791.

63. *Goldman v. Corn*, 111 App. Div. 674, 97 N. Y. Supp. 926.

64. *Baron v. Korn*, 51 Hun 401, 21 St. Rep. 62, 4 N. Y. Supp. 334, affirmed, 127 N. Y. 224; *Thomas v. Grand View Beach R. Co.*, 76 Hun 601, 58 St. Rep. 256, 28 N. Y. Supp. 201; *Birkett Mills v. Fenner*, 142 N. Y. Supp. 1045.

65. *Congregation Anshe Yosher v. First United Rayatiner Sokolower*

Verein, 32 Misc. 269, 66 N. Y. Supp. 356.

66. *Friedman v. Columbia Machine Works*, 99 App. Div. 504, 91 N. Y. Supp. 129.

67. *Jackson v. Bunnell*, 113 N. Y. 216.

68. *Finnegan v. Butler*, 112 Misc. 280, 192 N. Y. Supp. 671.

69. *Butterick Pub. Co. v. Loeser & Co.*, 232 N. Y. 86.

70. *Carroll v. Bullock*, 207 N. Y. 567.

71. *Duclos v. Kelley*, 122 App. Div.

the same action may be joined a claim for personal injuries as well as for property damage.⁷²

3. Answer.

As the granting of injunctive relief is within the discretion of the court, a defendant may allege in his answer facts which may properly be considered by the court in the exercise of its discretion.⁷³ Matters which arise either before or after the commencement of the action may be alleged if they relevantly affect the extent or nature of injunctive relief to be granted.⁷⁴ Matters of this character need not constitute an "absolute" defense; nor is it necessary that they be specifically alleged as a partial defense.⁷⁵ The potency of such facts will not be determined upon an application for judgment on the pleadings.⁷⁶

4. Form of complaint for trade-mark violation.⁷⁷

SUPREME COURT—NEW YORK COUNTY.

HARRY C. FISHER, Plaintiff,	}	
v's.		
STAR COMPANY, Defendant.	}	

The plaintiff for his complaint herein, alleges:

First. That the plaintiff is a citizen of the United States, State of New York, and a resident of the City, County and State of New York.

Second. That the defendant is a corporation organized and existing under and by virtue of the laws of the State of New York and is engaged in the publication of a newspaper in New York City entitled the New York "American," and has the principal office

329, 106 N. Y. Supp. 1058, reversed on other grounds, 197 N. Y. 76.

72. Lamming v. Galusha, 135 N. Y. 239.

73. Straus v. American Publishers' Assn., 103 App. Div. 277, 92 N. Y. Supp. 1052.

74. Straus v. American Publishers' Assn., 103 App. Div. 277, 92 N. Y. Supp. 1052; Whalen v. Union Bag, etc., Co., 130 App. Div. 313, 114 N. Y. Supp. 220.

75. Straus v. American Publishers' Assn., 103 App. Div. 277, 92 N. Y. Supp. 1052.

76. Straus v. American Publishers' Assn., 103 App. Div. 277, 92 N. Y. Supp. 1052; Robinson v. St. John's Guild, 197 App. Div. 260, 188 N. Y. Supp. 844.

77. This form is adapted from that used in Fisher v. Star Company, 231 N. Y. 414.

for the transaction of its business in the City, County and State of New York.

Third. That the defendant is also engaged, through its agent, International News Service, in selling cartoons to newspapers throughout the United States and Canada.

Fourth. That on August 8, 1910, plaintiff and defendant entered into a certain agreement in writing, a copy of which is annexed hereto and marked "Exhibit A," whereby the defendant covenanted and agreed, as set forth in paragraph Fourth thereof, that during the life of the said agreement, to wit: up to August 8, 1915, the defendant would not make or cause to be made any imitations of the plaintiff's cartoons known as "Mutt" and "Jeff."

Fifth. That the plaintiff has duly performed all of the conditions and obligations of the said agreement on his part to be performed.

Sixth. That in violation of the said paragraph Fourth of the said agreement, the defendant did prior to August 8, 1915, reproduce and cause to be reproduced without the plaintiff's knowledge or consent and by the hand of another artist, certain imitations of the plaintiff's said cartoons of "Mutt" and "Jeff" and the defendant has caused certain of the said reproductions or imitations of the plaintiff's said cartoons "Mutt" and "Jeff" to be published and distributed to certain newspapers throughout the United States.

Seventh. That the plaintiff is the exclusive originator and author of the said cartoon characters mentioned in the said agreement, and generally known to the public, as "Mutt" and "Jeff"; that the plaintiff exclusively originated and drew both of the said cartoon characters "Mutt" and "Jeff" and published them in newspapers other than the newspaper published by the plaintiff, long before the making of the said agreement and long before the plaintiff had published any of his said cartoons in the newspaper published by the defendant.

Eighth. That the plaintiff is the exclusive author and originator of the names "Mutt" and "Jeff" as applied to cartoons; that the plaintiff exclusively originated, published and used the names "Mutt" and "Jeff" as applied to his said cartoons long before the making of said agreement and long before the plaintiff had published any of his said cartoons in the newspaper published by the defendant; that the defendant never used the names "Mutt" and "Jeff" as applied to cartoons or otherwise until the plaintiff published his said cartoons in the defendant's newspaper, and then the defendant used the said names "Mutt" and "Jeff" only in connection with the plaintiff's said cartoons and as the said names were inserted by the plaintiff in the said cartoons and in the titles thereof.

Ninth. That the plaintiff has made a certain agreement in writing with The Wheeler Syndicate, Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, with the principal office for the transaction of its business located in the City, County and State of New York, in which the plaintiff has agreed, that after August 8, 1915, he will furnish

exclusively to the said The Wheeler Syndicate, Inc., as the plaintiff's exclusive selling agent, the plaintiff's said cartoons of "Mutt" and "Jeff" for the purpose of enabling the said The Wheeler Syndicate, Inc., to sell, the right to reproduce and publish the said cartoons to newspapers throughout the United States and Canada; that pursuant to the said agreement, plaintiff will receive seventy-five per cent (75%) of the gross income to the said The Wheeler Syndicate, Inc., from sales of the said rights by the said The Wheeler Syndicate, Inc., to newspapers throughout the United States and Canada; that the said The Wheeler Syndicate, Inc., has made some contracts and is endeavoring to make more contracts with newspaper publishers throughout the United States whereby the said publishers will pay the said The Wheeler Syndicate, Inc., large sums of money each week throughout periods of not less than one year and extending to as long as three years, beginning August 8, 1915, for the exclusive rights to publish the plaintiff's said cartoons of "Mutt" and "Jeff" in the respective localities wherein their said newspapers are published respectively.

Tenth. Upon information and belief, that the defendant is selling and offering for sale to newspapers throughout the United States and Canada the said imitations or reproductions of the plaintiff's said cartoons of "Mutt" and "Jeff" which are mentioned and described in paragraph Sixth of this complaint; and that the defendant is selling and offering for sale to newspapers throughout the United States and Canada other imitations or reproductions of the plaintiff's said cartoons of "Mutt" and "Jeff" in unlawful imitation of the plaintiff's said cartoons; and that the defendant is representing to the newspapers and to the public at large that it, the plaintiff, will sell and have for sale in the future the genuine "Mutt" and "Jeff" cartoons and that no other person or corporation has or will have the right to sell to newspapers the said "Mutt" and "Jeff" cartoons; and the plaintiff alleges that unless restrained as prayed for herein, the defendant will continue to sell and offer for sale to newspapers throughout the United States and Canada and to the public at large, the said imitation cartoons as and for the plaintiff's genuine "Mutt" and "Jeff" cartoons, whereby the said newspapers and the public at large are and will be deceived, all to the plaintiff's irreparable injury, as hereinafter set forth.

Eleventh. That for many years last past, that is to say, from in or about the year 1907, and continuously from that time up to the present, the plaintiff has applied to his said cartoons the words "Mutt" and "Jeff" to distinguish the plaintiff's said cartoons from cartoons drawn by other artists and published in other newspapers than those in which the plaintiff published his said cartoons; that the plaintiff's use of the words "Mutt" and "Jeff" as aforesaid has been exclusive and that prior to the acts of this defendant herein complained of, no one has ever used the words "Mutt" and "Jeff" as applied to cartoons other than the plaintiff and his authorized selling agents; that the plaintiff by such exclusive and continuous use of the words "Mutt" and "Jeff" as applied to his

said cartoons, has become generally known to the public at large and to the publishers of newspapers throughout the United States and Canada as the author of the "Mutt and Jeff" cartoons; that the plaintiff's said cartoons, because of such exclusive and continuous use and application by the plaintiff thereto of the words "Mutt" and "Jeff," have become generally known to the public at large and to the publishers of newspapers throughout the United States and Canada as the "Mutt and Jeff" cartoons; that the plaintiff has thereby acquired through such exclusive and continuous use of the words "Mutt" and "Jeff" as applied to the said cartoons the exclusive right to use the words "Mutt" and "Jeff" as his trade-mark as applied to his said cartoons.

Twelfth. That the plaintiff has also for many years last past, that is to say, from in or about the year 1910 and continuously from that time up to the present, published his said "Mutt" and "Jeff" cartoons in book form and in that form the plaintiff has sold them to newspapers and to the public at large throughout the United States and Canada; that the plaintiff's said books of cartoons have always had printed thereon the words "The Mutt and Jeff Cartoons" as a title and name under which they have been continuously sold to the newspapers and to the public for many years last past; that the plaintiff's said use of the words "Mutt and Jeff" as applied to cartoons has been exclusive and that prior to the acts of this defendant herein complained of no one has ever used the words "Mutt and Jeff" as applied to cartoons other than the plaintiff and his authorized selling agents.

Thirteenth. Upon information and belief, that the defendant is representing to the public at large and to newspapers throughout the United States and Canada that the "Mutt and Jeff" cartoons can be obtained and purchased only from the defendant and that it will restrain the publication of any cartoons as the "Mutt and Jeff" cartoons in any newspaper unless the said cartoons are purchased from the defendant; and that by the said false and deceiving representations the public at large and the newspapers are being deceived into believing that the defendant is selling the plaintiff's genuine "Mutt and Jeff" cartoons, and thereby is being and will continue to be irreparably damaged as hereinafter alleged.

Fourteenth. That because of the acts and representations of the defendant herein complained of, the plaintiff is being, and will continue to be, irreparably damaged in his business of selling his said "Mutt and Jeff" cartoons to the public at large and to newspapers throughout the United States and Canada; that the plaintiff's reputation as an artist and as the author of the said "Mutt and Jeff" cartoons will be irreparably damaged by the fraudulent imitation cartoons being sold and offered for sale by the defendant as and for the plaintiff's genuine "Mutt and Jeff" cartoons; that the plaintiff has no adequate remedy at law in damages for the wrongs herein complained of.

Wherefore, the plaintiff demands judgment against the defendant that the defendant be restrained and perpetually enjoined from advertising or offering for sale or selling any cartoons in imitation

of the plaintiff's cartoons of the character's known as "Mutt" and "Jeff"; and from using either the word "Mutt" or the word "Jeff" as applied to or in connection with cartoons sold or advertised and offered for sale by the defendant; and from drawing, publishing or selling any cartoons under the title or designation "Mutt and Jeff"; and from in any manner unlawfully interfering with the plaintiff's exclusive right to use the words "Mutt and Jeff" as a title or designation for cartoons; and that the plaintiff may have such other and further relief in the premises as may be just and equitable.

5. Form of complaint for violation of building covenant.⁷⁸

SUPREME COURT—MONROE COUNTY.

JAMES S. SIMMONS, Plaintiff,

vs.

FRANCIS I. CRISFIELD, Defendant.

Complaint.

The plaintiff above-named complains of the defendant herein and for a cause of action against him, alleges as follows:

I. That on or about the 15th day of February, 1897, Julia H. Hurd died seized in fee simple and in possession of the two following described parcels of real estate, situate in the City of Rochester, County of Monroe, and State of New York, to wit: Those two tracts or parcels of land situate in the City of Rochester, County of Monroe and State of New York, known as Lots 21 and 22 of the Martindale tract shown on a map of said tract filed in Monroe County Clerk's Office, June 1st, 1888, in Liber 5 of Maps, at page 36. That said lots adjoin on the east side of Colvin Street, in said City of Rochester, and are each forty (40) feet in width in front and rear and about one hundred and fifty (150) feet in depth.

II. That said Julia H. Hurd left a Last Will and Testament, which was duly admitted to probate by the Surrogate of the County of Monroe on the 14th day of June, 1897, a true copy whereof is hereto annexed, marked "Exhibit A" and made a part of this complaint.

III. That James S. Baker nominated as Executor in the Third paragraph of said Last Will and Testament, never qualified as an Executor thereof and died on or about the 1st day of July, 1900; that William Pitkin nominated in the Third paragraph of said Last Will and Testament as Executor, on or about the 14th day of June, 1897, duly qualified as Executor thereof and entered upon the discharge of his duties as such and has since been and still is acting as sole Executor of said Last Will and Testament.

⁷⁸. This form is adapted from that used in *Simmons v. Crisfield*, 197 N. Y. 365.

IV. That on or about the 15th day of April, 1907, the said William Pitkin, acting as Executor aforesaid, and under the power of sale contained in the Third paragraph of said Last Will and Testament, granted and conveyed by Executor's deed to this plaintiff the premises hereinbefore described as Lot 22 of the Martindale tract; that said deed was on the 17th day of April, 1907, duly recorded in the office of the Clerk of the County of Monroe and that a true copy thereof is hereto annexed, marked "Exhibit B," and made a part of this complaint.

V. That on the 10th day of June, 1907, the said William Pitkin, acting as Executor aforesaid and under the power of sale contained in the Third paragraph of said Last Will and Testament, granted and conveyed by Executor's deed to the defendant the premises, hereinbefore described as Lot 21 of the said Martindale tract; that said deed was duly recorded in the office of the Clerk of the County of Monroe, on the 10th day of June, 1907, and that a true copy thereof is hereto annexed, marked "Exhibit C," and made a part of this complaint.

VI. And this plaintiff further shows that the said Lot 21 of the Martindale tract so conveyed to the defendant, as hereinbefore set forth, is the Lot 21 of the Martindale tract referred to in the deed to this plaintiff, annexed hereto and marked "Exhibit B," as set forth in Paragraph IV of this complaint and that the defendant prior to accepting the deed to said Lot 21 of the Martindale tract, had due notice of the conveyance to this plaintiff of Lot No. 22 of said Martindale tract and of the conditions and restrictions imposed on said Lot 21 in and by said deed.

VII. That thereafter the defendant filed with the Bureau of Buildings and Combustibles of the City of Rochester, a copy of the general construction, plans and specifications of a proposed dwelling-house and store to be erected on Lot 21, and also furnished to the said Bureau of Buildings and Combustibles a written statement of the proposed location of such building, its character, use and location on the premises, together with the full name and address of the owner and all other matters in and by the City Ordinances of the City of Rochester required to be furnished, and made application to said Bureau of Buildings and Combustibles for a permit to erect such building. That said written statement showed that the defendant proposed to erect such dwelling-house and store on said Lot 21 less than twenty feet from the east line of Colvin Street fronting the same, to wit, on the line of Colvin Street, and thereafter the said Bureau of Buildings and Combustibles duly granted to the defendant a permit to erect said building on said Lot 21 on the line of Colvin Street and not twenty feet back from the same. That defendant on or about the 11th day of June, 1907, commenced the erection of said dwelling-house and store, and has since been and still is engaged in such erection, and is about to place the front wall of such building less than twenty feet from the east line of Colvin Street fronting the same, contrary to the covenants and restrictions contained in the deed to this plaintiff, set forth in Paragraph IV of the complaint herein,

and is about to place the front wall of said building on the line of Colvin Street and twenty (20) feet in front of the building line to which any building erected on said Lot 21 is restricted.

VIII. That at the time when the defendant commenced the erection of his building, to wit, on the 11th day of June, 1907, this plaintiff notified the defendant that the defendant was violating the restrictions imposed on said Lot 21 by William Pitkin, as sole Executor of Julia H. Hurd, deceased, as set forth in Paragraph IV herein, and that defendant's building must be set back twenty (20) feet from the line of Colvin Street, and that should the defendant refuse to erect his building in conformity with such restrictions, this plaintiff would by legal means seek to enforce his compliance with such restrictions; that the defendant has refused and neglected to conform to such restrictions, and to place his building twenty (20) feet back from the line of Colvin Street, and has continued, and is still continuing to erect the said building on said Lot 21 on the line of Colvin Street and twenty (20) feet in front of the line to which any building erected on said Lot 21 is restricted.

IX. By reason of the defendant erecting his said building, as hereinbefore set forth, on the line of Colvin Street, and not twenty (20) feet back therefrom, the said defendant's building will obstruct the view from any building which may be erected on Lot 22, and make the appearance of any such building unsightly and less desirable; it will conceal the said building from the street and otherwise injuriously affect such building thereby, rendering said Lot 22 less convenient and comfortable for residence purposes and materially decreasing the value thereof, and that by reason of the wrongful acts and doings of the defendant, and the injury threatened to plaintiff's property, as aforesaid, the market value of plaintiff's property will be thereby greatly decreased.

Wherefore, plaintiff demands judgment against defendant that the defendant be restricted from erecting any building on Lot 21 of the Martindale tract nearer to Colvin Street than twenty (20) feet from the east line thereof and for the costs of this action and for such other and further relief as to the Court may seem just.

WILLIAM O. CAMPBELL,
Plaintiff's Attorney,
55 Liberty Street,
New York City.

6. Form of complaint for trespass on timber lot.⁷⁹

SUPREME COURT—FRANKLIN COUNTY.

EDWARD H. LITCHFIELD, <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;"><i>vs.</i></div> EDWARD A. BOND, CHARLES A. FLANAGAN and DAVID C. WOODS, <div style="text-align: right;">Defendants. </div>	}	Complaint.
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The above-named plaintiff complains of the above-named defendants, and alleges:

That in the month of September, in the year 1893, this plaintiff purchased a tract of land located in the County of Franklin, State of New York, known as the Tract Number One of the so-called Macomb Purchase, which tract so purchased by this plaintiff is located in the southwest corner of the said County of Franklin, being bounded on the west by the County of St. Lawrence, and on the south by the County of Hamilton. The purpose of this plaintiff in making said purchase was to establish and maintain thereon a game preserve for the propagation and protection of fish, birds and game, pursuant to an Act of the Legislature of this State, known as "The Forest, Fish and Game Law," and thereupon, pursuant to the provisions of said Act, this plaintiff posted along the entire boundary of so much of said premises as he at that time purposed to constitute into such game preserve, notices not less than one foot square, warning all persons against hunting or fishing or trespassing thereon, which notices were posted not more than forty rods apart along the entire boundary thereof, and one notice was posted for each one hundred acres of said tract, all as required by said Act, which notices are still posted as aforesaid.

That this plaintiff, in further execution of the said purpose, and in or about the year 1895, constructed around a portion of the premises so purchased by him, being the portion which at that time he purposed to devote to the purposes of the game preserve, as aforesaid, a steel wire fence eight feet in height, eighteen and a half miles in length, enclosing an area of some nine thousand acres of land, and introduced therein, in addition to the native game, moose, elk, blacktail deer, fallow deer, hares and other game, with the purpose and intent of thereby creating and maintaining a park or preserve within which all of such game might flourish and increase and be protected from outside interference. For this purpose it became necessary and was important for this plaintiff to maintain the forest upon such territory intact so far as possible,

⁷⁹ This form is adapted from that used in *Kitchfield v. Bond*, 186 N. Y.

both because the existence of such forest was adapted to the better preservation of such game and because the said forest furnished them with food necessary for their support, and to that end the plaintiff has carefully refrained from cutting down or permitting to be cut down any of the trees or brush upon said premises, except so far as the same was necessary for the opening of roads for convenient access to the different parts of said park. The game thus enclosed by this plaintiff within said park have largely increased in numbers, and it became and was and is of the greatest importance to preserve the trees thereon, and especially those trees than can easily be reached by the moose, elk and deer, who make the twigs and foliage thereon their food while the ground is covered with the deep snows in winter.

The exotic game so as aforesaid placed within said park by this plaintiff have been procured by him at great expense and are very valuable, and it is important to preserve the said fence intact so as to prevent the said animals from escaping from plaintiff's said premises, which was the purpose of constructing said fence.

The said fence is fastened wherever practicable to living trees and the plaintiff, for the purpose of maintaining the same intact, has established and maintains a regular patrol along the whole length of the said fence, so that all breaks therein may at once be remedied and repaired.

This plaintiff in or about the year 1896, and subsequently, constructed a road leading from the public road at Moody's, a small hamlet on the shores of Big Tupper Lake, to the entrance gate of plaintiff's said park, which is a conspicuous object, and it and the road are well known to all of the inhabitants in that region of the country, the gate being notoriously the entrance to the said park.

In or about the month of August, 1902, the said defendants or some of them, with a large party of wood cutters, hired by them for that purpose, without the knowledge or consent of this plaintiff, and without applying to him for such consent and without applying to him for permission to enter at the said well known entrance to said park, maliciously tore down and destroyed a portion of the fence so erected by plaintiff along the south boundary of said park, and entered in and upon the same, either through the fence as so destroyed, or by climbing over the said fence, and with the full knowledge of the plaintiff's rights in the premises, and as plaintiff is informed and believes, with the purpose and intent of injuring the said premises of this plaintiff, cut down and destroyed some two thousand trees in said park, the property of this plaintiff, and entirely denuded of trees and shrubs a tract upon said plaintiff's park of 1351 feet in length, and from 15 to 35 feet in width, located along and near the south boundary of said park, and in the following October (being October, 1902), again entered upon said premises in the manner aforesaid, and cut down and destroyed all the trees and vegetation located upon a strip of land within the said park, and along and near the south boundary thereof from 6 to 10 feet in width, and about three miles in length, and the said defendants, or some of them, have stated and

threatened that they purpose and intend, upon the opening of the coming spring, to enter again upon plaintiff's said premises and to further cut down and destroy trees and vegetation thereon, the property of this plaintiff.

That the defendant, Edward A. Bond is, and at the said times was, the State Engineer, and that the defendants, Flanagan and Woods, were and are his assistants, and as plaintiff is informed and believes, it is insisted and claimed in the part of said defendants that they have entered upon plaintiff's said premises and destroyed his said property as aforesaid, under the provisions of Chapter 473 of the Laws of 1902, but this plaintiff says that he has been advised and therefore insists that the said statute confers no authority upon the defendants or any other person to enter upon or destroy private property; it provides no method of compensation to the owner of such property for its destruction; and that the State of New York and its agents have no authority, to enter upon the premises of this plaintiff without his consent, and destroy his property for any purpose whatever, except under some provision of law providing for a just compensation for such destruction, and a proper method to determine and to adjudge the value of the property so taken and destroyed, and then only in such cases where the public welfare requires such taking and destruction.

And this plaintiff alleges that the value of the trees so destroyed as lumber is a very small, if any, measure of their value to this plaintiff. That for the purposes aforesaid it is important that the forest so far as possible should remain intact, both as affording shelter and food to the game enclosed within such fence.

That of the trees so destroyed by said defendants, 1,400 or thereabouts were under four inches in diameter, and were of no value whatever as lumber, or for any merchantable purposes, but were of great value to this plaintiff as providing food for the animals enclosed within said fence, and because they would grow, increase in size and take the place of trees which would have died in the course of nature, and would thus have preserved intact the forest on said park, which it is most important to the plaintiff's purpose should be so preserved.

That in addition to the said trees, the said defendants cut down and destroyed three trees upon which this plaintiff's said fence had been fastened, and which were necessary for its support.

And plaintiff further shows that no money award could compensate him for the destruction and injury to his park, caused by the destruction of these trees, which will require more years than this plaintiff is likely to live to replace, and such destruction, if continued, can only result in the entire destruction of the said park as a game preserve, as above stated, and this plaintiff alleges, upon information and belief, that the said destruction was wanton, malicious and entirely unnecessary, and that the damage thereby inflicted upon his said park is at least the sum of Five Thousand Dollars.

And plaintiff further shows, that during the months of August

and October last, the said defendants, or some of them, without the knowledge or consent of this plaintiff, and without asking his permission so to do, have from time to time, and as often as they deemed best, entered and trespassed upon plaintiff's said park and passed through the same for their own convenience and to the injury of plaintiff's said premises, and they threaten and state that they intend to continue such trespasses whenever it seems good to them so to do.

The plaintiff further shows, upon information and belief, that all such acts were done with the knowledge, consent and by direction of the said defendant Bond.

Wherefore, plaintiff prays judgment herein against said defendants that they and each of them, their and each of their agents, servants and employees be perpetually enjoined and restrained by a judgment of this Court from entering upon the said premises of this plaintiff and from cutting down, or in any other manner destroying any of the plaintiff's trees, or the other property thereon, and from doing any other acts in contravention of this plaintiff's proprietorship in said premises, or which are likely to cause injury thereto, and that pending this action and until the final determination thereof, the said defendants and each of them, their and each of their agents, servants and employees be enjoined by an order of this Court as aforesaid, and that it be adjudged that this plaintiff recover from said defendants the sum of Five Thousand Dollars as damages as aforesaid, besides the costs and disbursements of this action.

7. Form of complaint to restrain violation of ordinance.⁸⁰

SUPREME COURT—MONROE COUNTY.

<p style="text-align: center;">THE CITY OF ROCHESTER,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">EDWARD C. GUTBERLETT.</p>	}
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The City of Rochester, the plaintiff above named, for its complaint against the above-named defendant, respectfully shows to the Court:

First. That the plaintiff is, and at all times hereinafter mentioned was, a municipal corporation of the State of New York, duly incorporated and acting as such under and by virtue of certain acts of the Legislature of the State of New York, viz.: Chapter 199 of the Laws of 1834, chapter 14 of the Laws of 1880, chapter 182 of the Laws of 1898 and chapter 755 of the Laws of 1907, and the various acts amendatory thereof and supplemental thereto,

⁸⁰. This form is adapted from that used in *City of Rochester v. Gutberlett*, 211 N. Y. 309.

all of which acts are public acts, and to which reference is hereby made as and for a part of this complaint.

Second. Plaintiff further shows to the Court that on the 23d day of August, 1904, the Common Council of the City of Rochester, under and by virtue of authority theretofore conferred upon it by the Legislature of the State of New York to enact ordinances for the government of the city management of its business, the preservation of good order, peace and health, and the safety and welfare of its inhabitants, duly enacted an ordinance known as the Health Ordinance of the City of Rochester, containing regulations and provisions deemed necessary by the Common Council for the preservation of the public health and the safety and welfare of the inhabitants of said city, a copy of which ordinance is hereto annexed, marked "Exhibit A," and intended to be made a part hereof.

Plaintiff further shows that on the 10th day of December, 1907, under and by virtue of authority upon it conferred by the Legislature of the State of New York, the Common Council of the City of Rochester enacted an ordinance amending Subdivision B of Section 8 of the Health Ordinance above referred to, a copy of which amending ordinance is hereto attached, marked "Exhibit B," and intended to be made a part of this complaint.

Plaintiff further shows that both of the ordinances above referred to were, and each of them was, within sixty days of the time of their enactment, duly approved by the Mayor of said city, and duly published in all respects as required by the provisions of the State laws in force within the City of Rochester at the time of their enactment; and that said ordinances, and each of them, thereupon became operative and valid, and all of the provisions thereof relating to the handling and collection of garbage within the City of Rochester and requiring a license therefor, have been at all times since the enactment, approval and publication of said ordinances, and now are, in full force and operation within said city as a valid exercise of the legislative power conferred upon the Common Council of said city by the Legislature of the State of New York, for the protection of the health of the inhabitants of said city and their security and welfare.

Third. Plaintiff further shows, upon information and belief, that the defendant is a farmer residing in the town of Gates, Monroe County, N. Y.

Plaintiff further shows to the Court, upon information and belief, that the said defendant, in violation of the provisions of Subdivision B of Section 8 of the Health Ordinance, as amended, above referred to, and without a license from the Bureau of Health as required by said ordinance,—has continuously carried on, and is now carrying on the business of scavenger, collector of garbage, bones and kitchen refuse within the city weekly, and during part of the term aforesaid two or three times a week, from a number of places within the city, and that neither the defendant nor any nor either of his said agents, servants or employees had, at the time of making such collections of garbage, bones and kitchen refuse, any license from

the Bureau of Health of the City of Rochester, as required by the provisions of the Health Ordinance aforesaid.

Plaintiff further shows, upon information and belief, that the said defendant, his said agents, servants and employees, have been repeatedly requested and directed by the police officers of the City of Rochester to stop the said unlawful collection of garbage, bones and kitchen refuse within the city; and the said defendant, and his said agents, servants and employees, have failed and refused to comply with the said requests and directions of said police officers; and the plaintiff further shows, upon information and belief, that the said defendant intends to continue the said unlawful collection of garbage, bones and kitchen refuse within the city.

Plaintiff further shows to the Court that compliance with said provisions of said ordinances is necessary for the proper protection of the health of the people of said city; and that if the continued violation by the defendant of the provisions of said ordinances relating to the collection and handling of garbage is permitted, the public health and welfare of the residents of the City of Rochester will be greatly injured, and grave risk of loss of life and health to the residents of the city will be occasioned.

Wherefore, plaintiff prays judgment against the defendant, enjoining the defendant from collecting or carrying on the business of scavenger, collector of garbage, bones and kitchen refuse within the City of Rochester without a license from the Bureau of Health, and that a permanent injunction may be issued out of this Court enjoining the said defendant from any future violation of the provisions of said ordinances, and from aiding, abetting or directing his agents, servants and employees to engage in the collection of garbage within the city, without the license required by the Health Ordinance hereinbefore referred to; and that the plaintiff have judgment against the defendant for the costs of this action.

D. Preliminary injunctions.

1. In general.

A court of equity has no inherent power to grant interlocutory injunctions. The authority therefor must be found in statute.⁸¹ Article 51 of the Civil Practice Act specifies the cases in which a temporary injunction may be granted. Such relief may be granted under Section 877 in a case where the right thereto depends upon the nature of the action.⁸² Under section 878, an injunction *pendente lite* may be granted where the right thereto depends upon extrinsic

⁸¹ *Bachman v. Harrington*, 184 N. Y. 458; *Brockway v. Miller*, 144 App. Div. 239, 128 N. Y. Supp. 1079; *People v. McKane*, 78 Hun 154, 28 N. Y. Supp. 981.

⁸² *Cushing v. Ruslander*, 49 Hun 19, 1 N. Y. Supp. 505, 15 N. Y. Civ. Proc. 106.

facts, as that the defendant is about to do some act to render a judgment ineffectual.⁸³ Section 877 is peculiarly applicable to actions for injunctions. But, under either section, the relief must be accessory to a pending action, or one about to be commenced.⁸⁴ Injunctive relief cannot be granted upon a petition or moving papers in the absence of an action.⁸⁵ Section 1218 authorizes a temporary injunction in an action by the Attorney-General for the unlawful exercise of corporate rights.⁸⁶

Preliminary injunctions are granted with caution.⁸⁷ The granting of an injunction *pendente lite*, though commonly done, is nevertheless an exercise of an extraordinary power of the court.⁸⁸ It is appropriately granted to preserve the *status quo* during the pendency of the action.⁸⁹ But to secure favorable action in advance of a trial of the issues, especially if the defendant is embarrassed thereby, the plaintiff must present a reasonably clear case.⁹⁰ The plaintiff

83. *Bertha Zinc, etc., Co. v. Clute*, 7 Misc. 123, 27 N. Y. Supp. 342; *Cushing v. Ruslander*, 49 Hun 19, 1 N. Y. Supp. 505, 15 N. Y. Civ. Proc. 106.

84. **Persons not parties.**—An injunction is never granted against persons who are not parties to the suit. *Fellows v. Fellows*, 4 Johns. Ch. 25.

85. *Brockway v. Miller*, 144 App. Div. 239, 128 N. Y. Supp. 1079; *Rondout First Nat. Bank v. Navarro*, 17 N. Y. Supp. 900.

86. *People v. National Assn. C. P. A.*, 204 App. Div. 288, 197 N. Y. Supp. 775.

87. *Haight v. N. Y. Elevated R. Co.*, 49 How. Pr. 20. "The writ or order of injunction is a valuable remedial process. It has been in use for centuries, and in the present state of society its occasional application is as indispensable to the body politic, as certain medical and surgical operations are to the body natural. Like them, however, it requires great caution. An unguarded and too free use of the injunction power must inevitably lead to its entire suppression, a result which, in the course of time, none would deplore more than those who are now

so clamorous to bring it about." *Androvette v. Brown*, 4 Abb. Pr. 440, 15 How. Pr. 75.

88. *Johnson v. Kingston Board of Education*, 38 Misc. 593, 78 N. Y. Supp. 53; *Root v. Conkling*, 108 Misc. 234, 177 N. Y. Supp. 610.

89. *West v. Guaranty Trust Co.*, 83 Misc. 609, 145 N. Y. Supp. 634, reversed on other grounds, 162 App. Div. 301, 147 N. Y. Supp. 421; *Sultan v. Star Co.*, 106 Misc. 43, 174 N. Y. Supp. 52.

90. *Selchow v. Baker*, 93 N. Y. 59; *O'Connor v. National Park Bank*, 8 Misc. 288, 28 N. Y. Supp. 538; *Ellis v. Ellis*, 55 Misc. 34, 106 N. Y. Supp. 217; *Lakes Island Realty Co. v. McDermott*, 96 Misc. 37, 160 N. Y. Supp. 450; *Clark Paper & Mfg. Co. v. Stenacker*, 100 Misc. 173, 165 N. Y. Supp. 367; *Merrimack Mfg. Co. v. Garner*, 2 Abb. Pr. 318, 4 E. D. Smith 387; *Roberts v. Mathews*, 18 Abb. Pr. 199; *Woodward v. Harris*, 2 Barb. 439; *Steinberg v. O'Connor*, 42 How. Pr. 52; *Central Crosstown R. Co. v. Bleacher St., etc., R. Co.*, 49 How. Pr. 233; *Allison Bros. Co. v. Allison*, 4 Silv. Sup. 222, 26 St. Rep. 825, 7 N. Y.

must also show the necessity for immediate action by the court.⁹¹ It must appear to the court that the relief is necessary to protect him from injury.⁹² An injunction will not issue where the plaintiff's rights can be protected by the filing of *lis pendens*.⁹³ The relief is granted only when the acts complained of are present continuing acts, or there are indications of their continuance or perpetration in the future.⁹⁴

The courts justly hesitate to grant a temporary injunction where the relief thereby afforded is substantially the same as if the plaintiff had succeeded upon a trial of the issues.⁹⁵ Such relief will not be granted in a case where

Supp. 268; *Redfield v. Middleton*, 20 Super. Ct. (7 Bosw.) 649.

Distinction between final and preliminary injunctions.—"The respondents urge that, unless the right be clear and certain, the injunction should not issue. While this is always true in respect of permanent injunctions, the rule is not the same in regard to interlocutory relief. It is an established rule of equity jurisprudence that when an application is made to the court for an injunction, *pendente lite* if there appears to the court reason for believing from the papers submitted, including sufficient averments in the complaint, that the plaintiff will be successful in the suit upon grounds which are cognizable in a court of equity, that court, may, in its discretion, use the power of injunction to maintain the *status quo* until it can be determined, after a complete hearing of the cause, whether the plaintiff is, upon the facts to be ascertained, entitled to the relief sought, since, otherwise, the plaintiff, although he should ultimately prevail, might lose, pending the suit, rights and property to which he was found to be entitled but which could not later be restored by the decree. In other words, the object of a preliminary or interlocutory injunction is to prevent irreparable injury pending the final ascertainment of the right, but not to de-

termine the right itself." *People v. Long Island R. Co.*, 113 Misc. 700, 185 N. Y. Supp. 594, reversed on other grounds, 195 App. Div. 897, 186 N. Y. Supp. 589.

91. *VonBremen v. MacMonnies*, 132 App. Div. 912, 117 N. Y. Supp. 157; *Johnson v. Kingston Board of Education*, 38 Misc. 593, 78 N. Y. Supp. 53; *Clark Paper & Mfg. Co. v. Stenacker*, 100 Misc. 173, 165 N. Y. Supp. 367.

92. *Ellis v. Ellis*, 55 Misc. 34, 106 N. Y. Supp. 217; *Lakes Island Realty Co. v. McDermott*, 96 Misc. 37, 160 N. Y. Supp. 450; *Wood v. Draper*, 4 Abb. Pr. 322, 24 Barb. 187; *Roberts v. Mathews*, 18 Abb. Pr. 199; *Bagaley v. Venderbilt*, 16 Abb. N. Cas. 559; *McHugh v. Boston, Harlem & Erie R. Co.*, 66 Barb. 612; *Mayor, etc., of Rochester v. Curtiss, Clarke*, 336; *N. Y. Printing & Dyeing Establishment v. Fitch*, 1 Paige 97; *Osborn v. Taylor*, 5 Paige 515.

93. *Waddell v. Bruen*, 4 Edw. 671; *Stevenson v. Fayerweather*, 21 How. Pr. 449; *Gregory v. Gregory*, 33 Super. Ct. (1 Jones & S.) 1.

94. *Sleicher v. Grogan*, 43 App. Div. 213, 59 N. Y. Supp. 1065.

95. *Moses v. Solomon*, 150 App. Div. 563, 135 N. Y. Supp. 408; *New York, etc., R. Co. v. New York, etc., R. Co.*, 11 Abb. N. Cas. 386; *Bronk v. Riley*, 50 Hun 489, 3 N. Y. Supp. 446, 20 St. Rep. 401; *People v. McKane*, 78

the plaintiff's right to the equitable relief sought is doubtful.⁹⁶ Injunctions *pendente lite* which in effect determine the litigation, and give the same relief which it is expected to obtain by the judgment, should be granted with great caution and only when necessity requires.⁹⁷ It must appear that the plaintiff's contention is right in the main, and that his rights will be seriously impaired unless a preliminary injunction is granted.⁹⁸ If the rights of the parties depend upon the interpretation to be placed on written instruments which are all presented in court, the court may determine the question of law thus arising, although its decision on the application for a temporary injunction may in effect determine the litigation.¹

Especial caution is exercised in granting an injunction which will cause serious injury to a defendant.² Particularly is this true, when the affidavits are conflicting as to material facts.³ The plaintiff must show a clear right to the relief sought.⁴ The general rule is that an injunction *pendente lite* will be refused where it will do greater damage or create greater injury to the defendant to grant it than to the plaintiff to refuse it.⁵ An injunction will not be granted where great public or private loss or mischief will be pro-

Hun 154, 28 N. Y. Supp. 981; Way v. Haynes, 124 N. Y. Supp. 648; Strobebridge Lithographing Co. v. Crane, 35 St. Rep. 473; Steele v. Pittsburgh, etc., R. Co., 36 St. Rep. 198, 12 N. Y. Supp. 576.

96. Rochester, etc., R. Co. v. Monroe County Electric Belt Line Co., 78 App. Div. 38, 78 N. Y. Supp. 998; Cohen v. United Garment Workers, 35 Misc. 748, 72 N. Y. Supp. 341; Butterick Pub. Co. v. Typographical Union, 50 Misc. 1, 100 N. Y. Supp. 292.

97. Davis v. Epoch Producing Corp., 91 Misc. 631, 155 N. Y. Supp. 597; Lakes Island Realty Co. v. McDermott, 96 Misc. 37, 160 N. Y. Supp. 450.

98. New York, etc., R. Co. v. New York, etc., R. Co., 11 Abb. N. Cas. 386; Way v. Hayes, 124 N. Y. Supp. 648.

1. West v. Guaranty Trust Co., 162

App. Div. 301, 147 N. Y. Supp. 421.

2. Flint v. Charman, 6 App. Div. 121, 39 N. Y. Supp. 892; Shaver v. Cohn, 40 How. Pr. 129.

3. Message Photoplay Co. v. Bell, 179 App. Div. 13, 166 N. Y. Supp. 338.

4. St. Regis Paper Co. v. Santa Clara Lumber Co., 55 App. Div. 225, 67 N. Y. Supp. 149; New York Motion Picture Co. v. Universal Film Mfg. Co., 77 Misc. 581, 137 N. Y. Supp. 278; New York Dock Co. v. Flinn-O'Rourke Co., 182 N. Y. Supp. 12.

5. Brower v. Williams, 44 App. Div. 337, 60 N. Y. Supp. 716; Tolman v. Mulcahy, 119 App. Div. 42, 103 N. Y. Supp. 936; Lakes Island Realty Co. v. McDermott, 96 Misc. 37, 160 N. Y. Supp. 450; Lyon v. Bethlehem Engineering Corp., 129 Misc. 668, 223 N. Y. Supp. 506; Gallatin v. Oriental Bank, 16 How. Pr. 253.

duced, merely to protect a technical or unsubstantial right.⁶ But, where, upon balancing considerations of relative convenience and inconvenience, it is apparent that the act complained of is likely to result in irreparable injury to complainant, and the balance of inconvenience preponderates in his favor, the injunction will be granted.⁷

Ordinarily an injunction will not be granted during the pendency of an action determining the unconstitutionality of a provision of an ordinance or law. A court of equity, however, has jurisdiction to enjoin the enforcement of a municipal ordinance, upon the ground that it is unconstitutional, in cases where its enforcement would affect property rights and work irreparable injury.⁸

2. Breach of contract.

An injunction to restrain a threatened breach of a contract is in effect a specific performance, and relief during the pendency of the action is granted with great caution.⁹ It will not be permitted except in a case which plainly and imperatively calls for equitable interference.¹⁰ The plaintiff must show that he will be seriously prejudiced if relief is delayed until after a trial.¹¹ Thus, the courts are very cautious in granting interlocutory injunctive relief when called upon to restrain the violation of a contract for personal services.¹² An injunction *pendente lite* may be granted in an action to restrain the violation of a restrictive covenant, but not ordinarily to compel the removal before trial of a structure already erected.¹³

6. *Lakes Island Realty Co. v. McDermott*, 96 Misc. 37, 160 N. Y. Supp. 450.

7. *Cornwall v. Sachs*, 69 Hun 283, 23 N. Y. Supp. 500.

8. *Robinson v. Wood*, 119 Misc. 299, 196 N. Y. Supp. 209.

9. *Shubert Theatrical Co. v. Coyne*, 115 N. Y. Supp. 968.

10. *Close v. Flesher*, 8 Misc. 299, 28 N. Y. Supp. 737; *Strobridge Lithographing Co. v. Crane*, 35 St. Rep. 473.

11. *Ringler v. Mohl*, 115 App. Div. 549, 101 N. Y. Supp. 454.

12. *Tolman v. Mulcahy*, 119 App.

Div. 42, 103 N. Y. Supp. 936; *Mapleson v. Del Puente*, 13 Abb. Pr. N. C. 144; *Bronk v. Riley*, 50 Hun 489, 3 N. Y. Supp. 446, 20 St. Rep. 401; *Metropolitan Exhibition Co. v. Ward*, 9 N. Y. Supp. 779, 24 Abb. N. C. 393; *Shubert Theatrical Co. v. Coyne*, 115 N. Y. Supp. 968; *Strobridge Lithographing Co. v. Crane*, 35 St. Rep. 473; *Fredericks v. Mayer*, 14 Super. Ct. (1 Bosw.) 227.

13. *Williams v. Silverman Realty, etc., Co.*, 111 App. Div. 679, 97 N. Y. Supp. 945.

3. Trade-marks and trade-names.

An injunction to restrain the use of a trade-mark or trade-name ordinarily will cause substantial injury to the defendant, and hence is not granted unless the plaintiff establishes with reasonable clearness his right to the pirated name or mark.¹⁴ But, if the circumstances presented to the court indicate that the plaintiff will probably recover in the action, relief may be granted during the pendency of the action.¹⁵

4. Labor unions; strikes; boycott, etc.

A preliminary injunction is frequently granted in a controversy between a labor union and employers. Indeed, the principles governing the respective rights of capital and labor have been, to a large extent, determined in cases where the ultimate question was the propriety of granting or denying an injunction *pendente lite*. Usually, the difficulty has been settled before the issues were finally determined. If an action is maintained to restrain strikers or others persons from committing unlawful acts, and the illegality of the measures adopted by the defendants clearly appears, and it is apparent that the employer is substantially injured thereby and has no other adequate remedy, a temporary injunction may properly be granted.¹⁶ The plaintiff need

14. New York Trust Co. v. New York County Trust Co., 125 Misc. 735, 211 N. Y. Supp. 785, affirmed, 212 N. Y. Supp. 882; Merrimack Mfg. Co. v. Garner, 2 Abb. Pr. 318, 4 E. D. Smith 387; Petridge v. Merchant, 4 Abb. Pr. 156.

15. Luyties Bros. v. Zimmerman & Co., 149 App. Div. 542, 133 N. Y. Supp. 997; Gotham Silk Hosiery Co. v. Reingold, 213 App. Div. 237, 210 N. Y. Supp. 38; Frohman v. Payton, 34 Misc. 275, 68 N. Y. Supp. 850; Yellow Cab Corp. v. Korpeck, 120 Misc. 499, 193 N. Y. Supp. 871; Bush Terminal Co. v. Bush Terminal Trucking Co., 123 Misc. 448, 206 N. Y. Supp. 2; Partridge v. Menck, 2 Barb. Ch. 101, 5 N. Y. Leg. Obs. 94, affirmed, 1 How. App. Cas. 547.

16. Herzog v. Fitzgerald, 74 App.

Div. 110, 77 N. Y. Supp. 366; Schlang v. Ladies' Waist Makers' Union, 67 Misc. 221, 124 N. Y. Supp. 289; Gar-side v. Hollywood, 88 Misc. 311, 150 N. Y. Supp. 647; Third Ave. Ry. Co. v. Shea, 109 Misc. 18, 179 N. Y. Supp. 43, affirmed, 181 N. Y. Supp. 956; Pre Catelan, Inc. v. International Federation of Workers, 114 Misc. 662, 188 N. Y. Supp. 29; Floersheimer v. Schlesinger, 115 Misc. 9, 187 N. Y. Supp. 891; Schwartz & Jaffee v. Hillman, 115 Misc. 61, 189 N. Y. Supp. 21.

Injunction against "all other persons."—Where in an action for conspiracy all of the defendants are charged therewith, a motion to vacate an injunction as to defendant, with reference to whom no specific tortious act is alleged, will be denied. An injunction against "all other persons"

not present all of the evidence of unlawful acts which it might show on a trial of the issues, it being sufficient if enough evidence is supplied to satisfy the court that the material allegations of the complaint are true.¹⁷

The fact that the allegations of unlawful conduct are denied by the defendants is entitled to weight,¹⁸ for a temporary injunction should be refused where the plaintiff's right to the relief is doubtful, and the temporary relief will be the same as if the plaintiff succeeded upon the trial.¹⁹ Yet the denials of the defendants do not demand the refusal of relief during the pendency of the suit.²⁰ The general rule that an injunction will not be granted *pendente lite*, when all of the equities of the complaint are denied in the answer, does not apply to labor controversies where the defendants do not claim the right to do the things with which they are charged.²¹

The granting of a temporary order is discretionary, and the court may properly consider the possible injury to the public.²² During the recent war, the courts were easily led to grant injunctions, the maintenance of factory production being deemed a public necessity.²³ The circumstance that one of the parties has refused to arbitrate the difficulty may be considered on the question of discretion.²⁴

5. Mandatory injunction.

As a general rule a mandatory injunction is granted only by a final judgment. Cases are extremely rare in which

without connecting them with the defendants, will be modified by adding after such words "acting in combination or collusion with them or in assertion of their rights or claims." *W. B. Coon Co. v. Meinhart*, 112 Misc. 650, 183 N. Y. Supp. 713.

17. *New York Central Iron Works v. Brennan*, 105 N. Y. Supp. 865.

18. *Piermont v. Schlesinger*, 196 App. Div. 659, 188 N. Y. Supp. 35; *Segenfeld v. Friedman*, 117 Misc. 731, 193 N. Y. Supp. 128.

19. *Cohen v. United Garment Workers*, 35 Misc. 749, 72 N. Y. Supp. 341.

20. *Herzog v. Fitzgerald*, 74 App. Div. 110, 77 N. Y. Supp. 366; *W. P. Davis Mach. Co. v. Robinson*, 41 Misc.

329, 84 N. Y. Supp. 837; *Michaels v. Hillman*, 111 Misc. 284, 181 N. Y. Supp. 165; *Pre Catelan, Inc. v. International Federation of Workers*, 114 Misc. 662, 188 N. Y. Supp. 29.

21. *Herzog v. Fitzgerald*, 74 App. Div. 110, 77 N. Y. Supp. 366; *W. P. Davis Mach. Co. v. Robinson*, 41 Misc. 329, 84 N. Y. Supp. 837; *Schlang v. Ladies' Waist Makers' Union*, 67 Misc. 221, 124 N. Y. Supp. 289; *Davis v. Zimmerman*, 91 Hun 489, 71 St. Rep. 385, 36 N. Y. Supp. 303.

22. *Gottlieb v. Matchkin*, 117 Misc. 128, 191 N. Y. Supp. 777.

23. See, *Rosenwasser Bros. v. Pepper*, 104 Misc. 457, 172 N. Y. Supp. 310.

24. *Berg Auto Trunk & Specialty*

mandatory relief has been granted during the pendency of the suit.²⁵ It will not be allowed unless the circumstances of the case imperatively demand such relief.²⁶ It will only be granted in an extreme case when the right to relief is clearly established.²⁷ The facts upon which it rests must be substantially admitted or clearly and unmistakably proved.²⁸ The court will not grant a mandatory injunction *pendente lite* unless the plaintiff's right is so clear that the denial of the right must be either captious or unconscionable.²⁹ Nevertheless, the court has the power, a proper case being shown, to grant such relief before the trial of the issues.³⁰ A proper case for this unusual exercise of power is presented in an action against a public utility to restrain it from discontinuing service, for in such a case the court may require the furnishing of service during the pendency of the action.³¹

6. When granted pending appeal.

When the plaintiff has been defeated upon the trial, a temporary injunction cannot be granted under section 877 of the Civil Practice Act during the pendency of an appeal by him.³² But while a case is pending in the appellate courts, an injunction may be granted under section 878, when necessary to protect the rights of the appellant and to save a judgment of reversal from being rendered in-

Co. v. Wiener, 121 Misc. 796, 200 N. Y. Supp. 745.

25. Williams v. Silverman Realty, etc., Co., 111 App. Div. 679, 97 N. Y. Supp. 945; Schneider v. Miller, 132 App. Div. 852, 117 N. Y. Supp. 287; Moller v. Lincoln Safe Deposit Co., 174 App. Div. 458, 161 N. Y. Supp. 171; Koenig v. Eagle Waist Co., 176 App. Div. 726, 163 N. Y. Supp. 1019; McNiece v. Sohmer, 29 Misc. 238, 61 N. Y. Supp. 193; Chamberlain v. Child's Unique Dairy Co., 54 Misc. 56, 105 N. Y. Supp. 370; Hanover Fire Ins. Co. v. Germania F. Ins. Co., 33 Hun 539.

26. Close v. Flesher, 8 Misc. 299, 28 N. Y. Supp. 737.

27. Moller v. Lincoln Safe Deposit Co., 174 App. Div. 458, 161 N. Y. Supp. 171; Fargo v. N. Y. & New England

R. Co., 3 Misc. 205, 23 N. Y. Supp. 360; Owen v. Partridge, 40 Misc. 415, 82 N. Y. Supp. 248.

28. Moses v. Solomon, 150 App. Div. 563, 135 N. Y. Supp. 408.

29. West Side Elec. Co. v. Consol. Tel., etc., Co., 87 App. Div. 550, 84 N. Y. Supp. 1052.

30. Boskowitz v. Cohn, 197 App. Div. 776, 189 N. Y. Supp. 419; People v. McKane, 78 Hun 154, 28 N. Y. Supp. 981.

31. Van Nest Land, etc., Co. v. New York, etc., Water Co., 7 App. Div. 295, 40 N. Y. Supp. 212; Schmitt v. Edison Elec., etc., Co., 58 Misc. 19, 110 N. Y. Supp. 44.

32. Spears v. Matthews, 66 N. Y. 127.

effectual.³³ Section 880 authorizes the Appellate Division to grant or continue an injunction order during the pendency of an appeal.³⁴

7. Discretion of court.

The court has a discretionary power as to whether an application for a preliminary injunction shall be granted or denied.³⁵ With this discretion the Appellate Division will seldom interfere, and the Court of Appeals is denied the power of review so far as the decision below rests on discretion.³⁶ In exercising the discretion committed to it, the court should consider the injury which may be caused to either or both parties,³⁷ the welfare of the public,³⁸ the laches of the plaintiff,³⁹ the length of time which will elapse before the case can be tried,⁴⁰ or any other circumstances which appeal to the conscience of the court.

8. Complaint to state cause of action.

Where a preliminary injunction is sought under section 877 of the Civil Practice Act, it must appear from the complaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act.⁴¹ An injunction *pendente lite* should not be granted under that section unless the complaint states

33. *Ocorr v. Lynn*, 105 Misc. 489, 173 N. Y. Supp. 518.

34. *U. S. Title Guaranty Co. v. Brown*, 158 App. Div. 542, 143 N. Y. Supp. 835; *Ocorr v. Lynn*, 105 Misc. 489, 173 N. Y. Supp. 518.

35. *VanDewater v. Kelsey*, 1 N. Y. 533; *Paul v. Munger*, 47 N. Y. 469; *People v. Schoonmaker*, 50 N. Y. 499; *Pfohl v. Sampson*, 59 N. Y. 174; *Young v. Campbell*, 75 N. Y. 525; *Hudson River Tel. Co. v. Watervliet, Turnp., etc., Co.*, 121 N. Y. 397; *Castoriano v. Dupe*, 145 N. Y. 250; *Rochester, etc., R. Co. v. Monroe County Electric Belt Line Co.*, 78 App. Div. 38, 78 N. Y. Supp. 998; *Schenck v. Underhill*, 205 App. Div. 162, 199 N. Y. Supp. 606; *Howe v. Rochester Iron Mfg. Co.*, 66 Barb. 592; *Sixth Ave. R. Co. v. Kerr*, 28 How. Pr. 382; *Grill v. Wiswall*, 82

Hun 281, 31 N. Y. Supp. 307; *Roberts v. Anderson*, 2 Johns. Ch. 202; *Hart v. Ogdensburg, etc., R. Co.*, 48 St. Rep. 801, 20 N. Y. Supp. 913.

36. See, *infra*, X-6, Appeals.

37. *McCafferty v. Glazier*, 10 How. Pr. 475.

38. *Barney v. New York*, 83 App. Div. 237, 82 N. Y. Supp. 124; *Floyd-Johes-United Elec. Light Co.*, 55 Misc. 529, 106 N. Y. Supp. 648; *McCafferty v. Glazier*, 10 How. Pr. 475; *Tracy v. Troy, etc., R. Co.*, 54 Hun 550, 7 N. Y. Supp. 892.

39. *Van Ranst v. New York Veterinary Surgeons' College*, 4 Hun 620.

40. *New York Trust Co. v. New York County Trust Co.*, 125 Misc. 735, 211 N. Y. Supp. 785, affirmed, 212 N. Y. Supp. 882.

41. *McHenry v. Jewett*, 90 N. Y. 58.

a cause of action for an injunction.⁴² The prayer for relief must contain a demand for injunctive relief.⁴³ Defects in the complaint cannot be supplied by affidavit.⁴⁴ Nor can matters occurring after the service of the complaint be presented in support of the order.⁴⁵ The complaint is a necessary part of the moving papers, and an order of injunction should not be granted upon affidavits only.⁴⁶ If the complaint is defective, the injunction should be dissolved, and should not be continued with leave to the plaintiff to serve an amended complaint *nunc pro tunc*.⁴⁷

9. Affidavits in support of complaint.

The statute provides that an order of injunction may be granted upon proof that sufficient grounds exist therefor.⁴⁸ The statute does not require an affidavit. In fact, the term "affidavit" includes a verified pleading.⁴⁹ Hence, if the

42. *McHenry v. Jewett*, 90 N. Y. 58; *Sanders v. Ader*, 26 App. Div. 176, 49 N. Y. Supp. 964; *Heine v. Rohner*, 29 App. Div. 239, 51 N. Y. Supp. 427; *Woodburn v. Hyatt*, 34 App. Div. 246, 54 N. Y. Supp. 597; *Goldman v. Corn*, 111 App. Div. 674, 97 N. Y. Supp. 926; *Loewenstein v. Loewenstein*, 114 App. Div. 65, 99 N. Y. Supp. 730; *Hart v. Clarke*, 127 App. Div. 679, 111 N. Y. Supp. 886, affirmed, 194 N. Y. 403; *Wood v. Cook*, 132 App. Div. 318, 117 N. Y. Supp. 51; *Uppercu v. Stevens*, 160 App. Div. 918, 145 N. Y. Supp. 699; *Bagg v. Robinson*, 12 Misc. 299, 34 N. Y. Supp. 37; *LeRoy v. Chesebrough*, 39 Misc. 285, 79 N. Y. Supp. 442; *Glascoe v. Willard*, 44 Misc. 166, 89 N. Y. Supp. 791; *Crocker v. Baker*, 3 Abb. Pr. 182; *Ely v. Connolly*, 7 Abb. Pr. N. S. 8; *Bruce v. Delaware, etc., Canal Co.*, 19 Barb. 371; *Hartt v. Harvey*, 32 Barb. 55, 10 Abb. Pr. 321, 19 How. Pr. 245; *Millikin v. Cary*, 5 How. Pr. 272, 3 Code Rep. 250; *Wordsworth v. Lyon*, 5 How. Pr. 463, Code R., N. S. 163; *Corning v. Troy Iron & Nail Factory*, 6 How. Pr. 89, 10 N. Y. Leg. Obs. 7; *Central Crosstown R. Co. v. Bleacher St., etc.*, R. Co., 49 How. Pr. 233; *Fowler v.*

Burns, 20 N. Y. Super. (7 Bosw.) 637; *Zazula v. Friedlander*, 181 N. Y. Supp. 673; *Benedict v. Seventh Ward R. Co.*, 6 St. Rep. 548.

43. *Maine Products Co. v. Alexander*, 115 App. Div. 109, 100 N. Y. Supp. 709; *Hovey v. McCrea*, 4 How. Pr. 31.

44. *Heine v. Rohner*, 29 App. Div. 239, 51 N. Y. Supp. 427; *Goldman v. Corn*, 111 App. Div. 674, 97 N. Y. Supp. 926; *Close v. Flesher*, 8 Misc. 299, 28 N. Y. Supp. 737; *Glascoe v. Willard*, 44 Misc. 166, 89 N. Y. Supp. 791; *Zazula v. Friedlander*, 181 N. Y. Supp. 673.

45. *American Waterworks Co. v. Venner*, 45 St. Rep. 441, 18 N. Y. Supp. 379.

46. *Sanders v. Ader*, 26 App. Div. 176, 49 N. Y. Supp. 964; *Woodburn v. Hyatt*, 34 App. Div. 246, 54 N. Y. Supp. 597; *South Shore Traction Co. v. Town of Brookhaven*, 53 Misc. 392, 102 N. Y. Supp. 1074; *N. & R. Theatres v. Basson*, 127 Misc. 271, 215 N. Y. Supp. 157.

47. *Wood v. Cook*, 132 App. Div. 318, 117 N. Y. Supp. 51.

48. Civ. Prac. Act, § 831.

49. Civ. Prac. Act, § 7, subd. 3.

allegations of the complaint are alleged as within the knowledge of the plaintiff, and the complaint is verified by him, the pleading may constitute sufficient proof to warrant the issuance of an injunction.⁵⁰ But, if the complaint is not verified, or if any material allegation of the complaint is stated on information and belief, additional proof in the form of affidavits is necessary.⁵¹ A complaint verified by the plaintiff's attorney is not sufficient without supporting affidavits.⁵² Allegations based upon information and belief, contained in an affidavit used on a motion for a temporary injunction, constitute no proof of facts so alleged, where neither the sources of the information nor the grounds of the belief are stated.⁵³

10. Opposing affidavits, answer containing denials.

Allegations of fact in a verified complaint or in a supporting affidavit, if made upon knowledge, are usually accepted as true.⁵⁴ Denials of material facts may create such a doubt that preliminary injunctive relief may be denied. The court hesitates to decide disputed questions of fact and the rights of the parties upon affidavits.⁵⁵ Thus, it is sometimes stated as a rule that, if all the equities of the complaint are denied by the answer, and the right of the plaintiff is not clear, injunctive relief will not be granted

50. *Bertha Zinc, etc., Co. v. Clute*, 7 Misc. 123, 27 N. Y. Supp. 342; *Levy v. Ely*, 6 Abb. Pr. 89, 15 How. Pr. 395; *Woodruff v. Fisher*, 17 Barb. 224; *Smith v. Reno*, 6 How. Pr. 124, Code Rep. N. S. 405; *Minor v. Terry*, 6 How. Pr. 208, Code Rep. N. S. 384; *Rome, etc., R. Co. v. Rochester*, 46 Hun 149; *Cushing v. Ruslander*, 49 Hun 19, 1 N. Y. Supp. 505, 15 N. Y. Civ. Proc. 106; *Fowler v. Burns*, 20 N. Y. Super. (7 Bosw.) 637.

51. *Gillett v. Noyes*, 92 App. Div. 313, 86 N. Y. Supp. 1062; *Lowry v. DeChandenedes*, 141 App. Div. 924, 125 N. Y. Supp. 1042; *Crocker v. Baker*, 3 Abb. Pr. 182; *Hecker v. New York*, 18 Abb. Pr. 369, 28 How. Pr. 21; *Williams v. Lockwood, Clarke*, 172; *Jewett v. Allen*, 3 How. Pr. 129; *Smith v. Reno*, 6 How. Pr. 124, Code Rep. N. S. 405;

Rateau v. Bernard, 12 How. Pr. 464; *Stull v. Westfall*, 25 Hun 1; *Cushing v. Ruslander*, 49 Hun 19, 1 N. Y. Supp. 505, 15 N. Y. Civ. Proc. 106; *Pidgeon v. Oatman*, 26 N. Y. Super. 706; *Campbell v. Morrison*, 7 Paige 157; *Orleans Bank v. Skinner*, 9 Paige 305.

52. *G. A. Gambrill Mfg. Co. v. E. R. Sherburne Co.*, 194 App. Div. 425, 185 N. Y. Supp. 502.

53. *Samuel Cupples Envelope Co. v. Lackner*, 99 App. Div. 231, 90 N. Y. Supp. 954.

54. *Foster v. Retail Clerks' International Protective Assn.*, 39 Misc. 48, 78 N. Y. Supp. 860; *Grimstone v. Carter*, 3 Paige 421.

55. *Warsaw Water Works Co. v. Warsaw*, 4 App. Div. 509, 40 N. Y. Supp. 28.

until after a trial of the issues.⁵⁶ This rule, however, applies only when the defendant asserts a right to do the acts in question, not when the defendant merely denies the commission of the acts.⁵⁷ Moreover, the court is not necessarily bound by mere denials, for, if such were the case, an order of injunction could seldom be sustained.⁵⁸

11. Undertaking.

In order to secure an order of injunction, the plaintiff must furnish the undertaking required by Article 52 of the Civil Practice Act.⁵⁹ Security, however, is not required when the action is brought by the people of the State, or by a domestic municipal corporation; or by a public officer in behalf of the people or of such a corporation.⁶⁰

12. Notice of application for order.

An order of injunction may be granted upon or without notice, in the discretion of the court or judge, unless the defendant has answered; in which case it can be granted

56. *Warsaw Water Works Co. v. Warsaw*, 4 App. Div. 509, 40 N. Y. Supp. 28; *Steinberg v. O'Connor*, 42 How. Pr. 52; *Grill v. Wiswall*, 82 Hun 281, 31 N. Y. Supp. 307; *Pidgeon v. Oatman*, 26 N. Y. Super. 706; *Benedict v. Seventh Ward R. Co.*, 6 St. Rep. 548.

57. *Schlang v. Ladies' Waist Makers' Union*, 67 Misc. 221, 124 N. Y. Supp. 239.

58. *Pre Catelan, Inc. v. International Federation of Workers*, 114 Misc. 662, 188 N. Y. Supp. 29.

59. *Howley v. Press*, 127 App. Div. 646, 111 N. Y. Supp. 1080; *Indestructible Metal Prod. Co. v. Summergrade*, 197 App. Div. 199, 188 N. Y. Supp. 642.

60. Civ. Prac. Act, § 162.

Conditions attached to order.—The purpose of section 162 of the Civil Practice Act forbidding the requirement of security from a municipal corporation as a condition of an injunction or other relief is to relieve the municipality of an obligation to

furnish sureties or cash. It does not deprive the court of its discretionary power to make a stay dependent upon an assumption of liability without arbitrary limit. In an action, therefore, brought by a municipality to restrain the erection of a gasoline station, the court may properly require, as a condition to the continuance of a temporary injunction, pending appeal from a judgment dismissing the complaint, that the plaintiff pay to the defendant all damages sustained, if the appellate court finally determine that the plaintiff is not entitled to the restraining order, and where the plaintiff took the benefit of the order and acquiesced in its conditions, upon affirmance of the judgment appealed from, a motion for the appointment of a referee to assess the damages was properly granted. *City of Utica v. Hanna*, 249 N. Y. 26.

The *Seneca nation of Indians*, being a public corporation within section 162, is not required to give security for the purpose of procuring a preliminary

only upon notice or an order to show cause. Where an application for an injunction is made upon notice or an order to show cause, either before or after answer, the court or judge may enjoin the defendant until the hearing and decision of the application.⁶¹ A county judge has been allowed to issue a show cause order in an action pending in the Supreme Court.⁶²

An injunction order, suspending the general and ordinary business of a corporation, or suspending from office, or restraining from the performance of his duties, a trustee, director, or other officer thereof, can be granted only by the court, upon notice of the application thereof, to the proper officer of the corporation, or to the trustee, director or other officer enjoined. If such an injunction order is otherwise made, it is void.⁶³ The right to assert the nullity of such an order is not waived by a motion to vacate it.⁶⁴

13. Order granting preliminary injunction.

An order of injunction must briefly recite the grounds on which it is granted.⁶⁵ A failure to recite the grounds does not render the order void,⁶⁶ but requires the granting of a motion to vacate it.⁶⁷

An injunction order, to be enforceable, must define speci-

injunction. *Seneca Nation of Indians v. John*, 27 Abb. N. C. 253, 16 N. Y. Supp. 40.

61. Civil Practice Act, § 882.

Supplemental injunction.—Under section 882 of the Civil Practice Act, a judge who has granted a preliminary injunction has no power, after the defendant has answered, to grant, on an *ex parte* application, a further order which, although recited to be a "supplementary injunction," enjoins the defendant from doing acts not enjoined by the original injunction. The subsequent service of an order to show cause why the injunction should not be continued, granted by a judge not in the district in which the action is brought, or in a county adjoining that in which the venue is laid, does not cure the irregularity or give the injunction new life from that date.

Rhodes v. Wheeler, 48 App. Div. 410, 63 N. Y. Supp. 184.

62. *Babcock v. Clark*, 23 Hun 391; *Morris v. New York*, 7 N. Y. Supp. 943, 17 N. Y. Civ. Proc. 407, reversed on other grounds, 55 Hun 476, 8 N. Y. Supp. 763.

63. General Corporation Law, § 305.

64. *Wilkie v. Rochester, etc., R. Co.*, 12 Hun 242.

65. Civ. Prac. Act, § 821.

66. *Schieffelin v. Hylan*, 109 Misc. 369, 179 N. Y. Supp. 413, affirmed, 191 App. Div. 324, 181 N. Y. Supp. 725, appeal dismissed, 229 N. Y. 633; *Church v. Haeger*, 66 St. Rep. 681, 33 N. Y. Supp. 47.

67. *Brockway v. Miller*, 144 App. Div. 239, 128 N. Y. Supp. 1079; *Hotchkiss v. Hotchkiss*, 16 Civ. Proc. R. 129, 2 N. Y. Supp. 825, 19 St. Rep. 767.

fically what the party enjoined must not do or must do. To leave it to the judgment of the party, and then punish him for any mistake of judgment, would be inequitable.⁶⁸ The order must not, by its terms, be permanent, as only a temporary injunction can be granted upon motion.⁶⁹

14. Service of order.

Section 883 of the Civil Practice Act specifies the manner in which an order of injunction shall be served.⁷⁰ If copies of the papers upon which the order was granted are not served with the order, the injunction may be vacated.⁷¹ The jurisdiction acquired by the court upon granting a temporary injunction in a show cause order is provisional and depends upon the performance of the condition subsequent, viz.: due service of the order and hearing thereon within the time limited prescribed in the order. Where the condition subsequent fails, the provisional jurisdiction ceases, the temporary injunction becomes void *ab initio* and the jurisdiction acquired upon its issuance is lost and cannot be regained at a time later than the return day of the order to show cause by making the order returnable at a later date.⁷²

15. Enforcement of order.

One wilfully violating an order of injunction is guilty of contempt of court and is punishable under Article 19 of the Judiciary Law.⁷³ A violation may be a criminal contempt under subdivision 3 of section 750 of the Judiciary Law.⁷⁴

The Supreme Court may punish as a contempt a violation of an injunction order issued in an action between two non-resident corporations, although the act was committed in another State.⁷⁵ If the order was extra-jurisdictional or

68. *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 55 App. Div. 225, 67 N. Y. Supp. 149; *Benedict v. International Banking Corp.*, 88 App. Div. 488, 85 N. Y. Supp. 188.

69. *Oppenheim v. Thanasoulis*, 123 App. Div. 494, 108 N. Y. Supp. 505.

70. *Davis v. Mayor, etc., of N. Y.*, 9 N. Y. 263.

71. *Penfield v. White*, 8 How. Pr. 87.

72. *New York v. Staten Island Midland R. Co.*, 110 Misc. 695, 181 N. Y. Supp. 124.

73. See *Fiero on Particular Actions and Proceedings*, vol. 1, page 555, et. seq.

74. *People v. Mecca Realty Co.*, 174 App. Div. 384, 161 N. Y. Supp. 241.

75. *Prince Mfg. Co. v. Prince Metallic Paint Co.*, 51 Hun 443, 4 N. Y. Supp. 348.

for some other reason void, it may be ignored, and contempt proceedings will fail.⁷⁶ But one charged with a violation cannot defend upon the ground that the order was irregular.⁷⁷ No matter how erroneous the action of the court may have been in taking cognizance of the suit and in awarding an injunction, unless there was an entire absence of judicial authority to act in the premises, it is the duty of the parties to obey its command until the order is dissolved on motion or on appeal or by some other method of direct review.⁷⁸ An appeal from an order of injunction does not authorize a violation.⁷⁹ But, if an irregular order is vacated or reversed before the contempt proceeding is brought on for a hearing, the contempt proceedings will be dismissed.⁸⁰

One who is restrained from doing a certain act, may be

76. *Bachman v. Harrington*, 184 N. Y. 458; *People v. McKane*, 78 Hun 154, 28 N. Y. Supp. 931; *People ex rel. Roosevelt v. Edson*, 52 Super Ct. (20 J. & S.) 53, 1 How. Pr. N. S. 482.

77. *New York v. New York, etc., Ferry Co.*, 64 N. Y. 622.

78. *Davis v. Mayor, etc., of N. Y.*, 9 N. Y. 263; *Erie R. Co. v. Ramsey*, 45 N. Y. 637; *People v. VanBuren*, 136 N. Y. 252; *Root v. Conkling*, 108 Misc. 234, 177 N. Y. Supp. 610; *Schieffelin v. Hylan*, 109 Misc. 369, 179 N. Y. Supp. 413, affirmed, 191 App. Div. 324, 181 N. Y. Supp. 725, appeal dismissed, 229 N. Y. 633; *People v. McKane*, 78 Hun 154, 28 N. Y. Supp. 981; *Capet v. Parker*, 5 Super. Ct. (3 Sandf.) 662, Code R. N. S. 90. "The granting of an injunction is justly regarded as one of the highest prerogatives of courts of equity. The most exact and explicit obedience is required from those against whom the mandate of the court is directed. With whatever irregularities the proceedings may be affected, or however erroneously the court may have acted in granting the injunction, it must be implicitly observed so long as it remains in existence; and the fact it has been obtained erroneously affords no justifica-

tion or excuse for its violation before it has been dissolved. The reason for the rule is found in the necessity of preserving the disastrous confusion that would result from allowing the parties against whom injunctions are issued, to be, themselves, the judges of the propriety of the relief, or the regularity of the proceedings. If the court granting an injunction had jurisdiction of the subject matter, until it had been set aside or revoked, it is entitled to explicit obedience. The violation of an injunction order constitutes a contempt of court, from which it issued, and the question of motive or intent with which the writ was disobeyed does not alter or vary the responsibility for its violation. Litigants should not be permitted under plea of hardship, real or pretended, to nullify or set at naught orders or decrees, even though it may seem certain that a court acted, in granting them, under misapprehension or mistake. *Root v. Conkling*, 108 Misc. 234, 177 N. Y. Supp. 610.

79. *Power v. Athens*, 19 Hun 165.

80. *People ex rel. Interborough Rapid Transit Co. v. Lavin*, 131 Misc. 758, 228 N. Y. Supp. 218.

guilty of contempt of court, if he knowingly permits another to commit the act.⁸¹ An injunction not only restrains the parties to the action in which it is granted, but also, when so drawn, those who act under or in connection with a party as agents, servants or employees. No person with a knowledge of the terms of an injunction, even if not a party himself, can act or co-operate with a party in aiding the prohibited act without incurring the penalty prescribed by statute.⁸²

E. Trial of issues.

An action for an injunction is equitable in its nature, and the issues are not triable as of right by a jury.⁸³ If the plaintiff seeks both legal and equitable relief in respect to the same cause of action, he waives, but does not deprive his adversary of, the right to a trial by jury.⁸⁴ Specific issues of fact may, in the discretion of the court, be submitted to a jury under section 430 of the Civil Practice Act.⁸⁵ The verdict of the jury on such an issue, is not conclusively binding upon the court.⁸⁶ And, if by reason of circumstances arising since the commencement of the action, the plaintiff is not entitled to injunctive relief at the time of the trial, the court may send the remaining issue of damages for trial by jury.⁸⁷ But, if the action was properly brought on the equity side of the court, and equitable relief is denied as a matter of discretion or because of facts arising since the commencement of the action, the court may determine the amount of damages which is allowed in lieu of injunctive relief.⁸⁸ On the other hand, if there was no equity in the plaintiff's case, or if the equity therein has failed because

81. *Wheeler v. Gilsey*, 35 How. Pr. 139.

82. *People v. Mecca Realty Co.*, 174 App. Div. 384, 161 N. Y. Supp. 241.

83. *Smith v. Ingersoll-Sargeant Rock Drill Co.*, 7 Misc. 374, 27 N. Y. Supp. 907, reversed on other grounds, 12 Misc. 5, 33 N. Y. Supp. 70, affirmed, 155 N. Y. 677.

84. *Carroll v. Bullock*, 207 N. Y. 567.

85. *Parker v. Laney*, 58 N. Y. 469.

86. *Comesky v. Postal Tel. Cable*

Co., 41 App. Div. 245, 58 N. Y. Supp. 467.

87. *Greenblatt v. Zimmerman*, 132 App. Div. 283, 117 N. Y. Supp. 18.

88. *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; *Hunter v. Manhattan R. Co.*, 141 N. Y. 281; *VanAllen v. New York El. R. Co.*, 144 N. Y. 174; *Smith v. Ingersoll-Sargeant Rock Drill Co.*, 7 Misc. 374, 27 N. Y. Supp. 907, reversed on other grounds, 12 Misc. 5, 33 N. Y. Supp. 70, affirmed, 155 N. Y. 677.

of his own acts, the defendant should not be deprived of his right to a jury trial on the issue of damages.⁸⁹

F. Relief granted.

1. Injunctive relief in general.

A successful action of injunction normally results in a decree which enjoins the defendant, and his agents, from the commission of certain acts.⁹⁰ The fact that an interlocutory injunction has or has not been granted, should not affect the determination on the merits.⁹¹ The prohibited acts must be explicitly stated so that the defendant is clearly advised by the judgment as to what he is not to do.⁹² It has been said that the language of the injunction should be so clear and explicit that an unlearned man can understand its meaning without the necessity of employing counsel to save him from subjecting himself to punishment for a breach of the injunction.⁹³

A trial in an action at law considers the circumstances as they existed at the time of the commencement of the action;⁹⁴ but a decree in an equitable action takes into consideration the facts appearing at the time of the trial.⁹⁵ The judgment in an action of injunction is adapted to the exigencies of the proof as they exist at the close of the trial.⁹⁶ Thus, injunctive relief may be withheld, if by the

^{89.} *Ackerman v. True*, 56 App. Div. 54, 66 N. Y. Supp. 6. See also, *Pegram v. New York El. R. Co.*, 147 N. Y. 135.

^{90.} *Conviser v. J. C. Brownstone & Co.*, 209 App. Div. 584, 205 N. Y. Supp. 82.

Improper form.—A judgment in an action to restrain a trespass upon real property which incorporates therein all of the findings of fact, not simply by way of recital but preceded by the words "It is ordered and decreed" is improper in form. *Seaside Home v. Atlantic Beach Associates*, 241 N. Y. 550.

^{91.} *Peck v. Goodberlett*, 109 N. Y. 180; *Hale v. Jenkins*, 55 Misc. 119, 106 N. Y. Supp. 282.

^{92.} *Porous Plaster Co. v. Seabury*, 16 St. Rp. 35, 1 N. Y. Supp. 134, 28 Week. Dig. 486.

^{93.} *Porous Plaster Co. v. Seabury*, 16 St. Rep. 35, 1 N. Y. Supp. 134, 28 Week. Dig. 486.

^{94.} *John D. Park, etc., Co. v. Hubbard*, 134 App. Div. 468, 119 N. Y. Supp. 347, affirmed, 198 N. Y. 136.

^{95.} *John D. Park, etc., Co. v. Hubbard*, 134 App. Div. 468, 119 N. Y. Supp. 347, affirmed, 198 N. Y. 136.

^{96.} *Peck v. Goodberlett*, 109 N. Y. 180; *Knoth v. Manhattan R. Co.*, 187 N. Y. 243; *Lyle v. Little*, 28 App. Div. 181, 50 N. Y. Supp. 947; *Shaw's Jewelry Shop v. New York Herald Co.*, 170 App. Div. 504, 156 N. Y. Supp. 651, affirmed, 224 N. Y. 731; *Niagara Falls Hydraulic Power Co. v. Pettebone-Cataract Paper Co.*, 198 App. Div. 644, 191 N. Y. Supp. 12; *Hale v. Jenkins*, 55 Misc. 119, 106 N. Y. Supp. 282.

lapse of time it is no longer necessary for the protection of the plaintiff's rights.⁹⁷

If the action was properly brought in equity, although equitable relief is denied, the court may grant other relief.⁹⁸ If, however, a trial of the issues proves that there was no equity in the plaintiff's complaint, the action will be dismissed without deciding other issues between the parties.⁹⁹ But, if the complaint states a cause of action, both for equitable and for legal relief, if it appears that the claim for equitable relief was unfounded, the action should not be dismissed, but the issues as to the cause at law should be sent to a jury for determination.¹

2. Mandatory injunction.

An action of specific performance is ordinarily the appropriate remedy when a plaintiff seeks to require a defendant to perform a certain act. But, in some cases, much the same relief is secured by an injunction which restrains the defendant from not doing the act. Injunctions which are thus affirmative in effect are termed "mandatory" injunctions. A party who, in the face of an action promptly brought for an injunction, goes on and completes the thing against which an injunction is sought, and which infringes a plaintiff's right, does so at his peril, and he may be compelled to undo that which he has done in defiance of a plaintiff's right and with full knowledge of his attempts to enforce them.²

A building which is deliberately erected contrary to a covenant restricting the use of the premises may be removed through a mandatory injunction.³ A tenant who has wrongfully made material alterations in the demised prem-

97. *Miller v. Edison Elec. Illum. Co.*, 66 App. Div. 470, 73 N. Y. Supp. 376.

98. See, *infra*, X-F-4, Legal relief in lieu of equitable relief.

99. *Loeser v. Liebman*, 137 N. Y. 163; *Arena, etc., Club v. McPartland*, 41 App. Div. 352, 58 N. Y. Supp. 477; *Ketchum v. Depew*, 81 Hun 278, 62 St. Rep. 757, 30 N. Y. Supp. 794.

1. *Westergren v. Everett*, 218 App. Div. 172, 218 N. Y. Supp. 68.

2. *Wormser v. Brown*, 72 Hun 93, 55 St. Rep. 633, 25 N. Y. Supp. 553, affirmed, 149 N. Y. 163.

3. *Lyons v. Edmonds*, 161 App. Div. 20, 146 N. Y. Supp. 277; *Smith v. Graham*, 161 App. Div. 803, 147 N. Y. Supp. 773, affirmed on opinion below, 217 N. Y. 655; *Perpall v. Gload*, 116 Misc. 571, 190 N. Y. Supp. 417, affirmed, 203 App. Div. 871, 196 N. Y. Supp. 946; *Pellegrino v. MacKenzie St. Constr. Co.*, 120 Misc. 89, 197 N. Y. Supp. 699, affirmed, 206 App. Div. 709, 200 N. Y. Supp. 939; *Taylor v. McAdam*, 112 N. Y. Supp. 50. See also, *Forstmann v. Joray Holding Co.*, 244 N. Y. 22.

ises can be compelled to restore them to their original condition.⁴ The restoration of a party wall which has been wrongfully altered by one of the proprietors, is an appropriate exercise of equitable jurisdiction.⁵ One who has an easement of light and air may require the removal of an obstruction to the enjoyment of his rights.⁶ An obstruction to a right of way or to the means of access to premises may similarly be removed in an action of injunction.⁷ So, too, the removal of rubbish or other materials wrongfully deposited on private premises is within the jurisdiction of equity.⁸

4. *McDonald v. O'Hara*, 117 Misc. 517, 192 N. Y. Supp. 545. Compare, *Engle v. Thorn*, 10 N. Y. Super. (3 Duer) 15.

5. *Herrman v. Hartwood Holding Co.*, 193 App. Div. 115, 183 N. Y. Supp. 402; *Metzger v. 46 West 95th St., Inc.*, 216 App. Div. 289, 214 N. Y. Supp. 664, affirmed, 244 N. Y. 520.

6. *Stevens v. Salomon*, 39 Misc. 159, 79 N. Y. Supp. 136.

7. *Appleby v. New York*, 199 App. Div. 539, 192 N. Y. Supp. 211, affirmed, 235 N. Y. 351; *Lambert v. Huber*, 22 Misc. 462, 50 N. Y. Supp. 793; *Cooley v. Cummings*, 16 St. Rep. 947, 1 N. Y. Supp. 631.

Obstruction approved by court.—Where a tenant of an upper room in a building, entitled under his lease to access by means of a stairway, sues to enjoin his landlord, when carrying out certain improvements in the building, from changing the location of the stairway to the alleged disadvantage of the plaintiff, and the tenant's motion for a temporary injunction has been denied and the denial sustained by the Appellate Division upon the condition that during the improvements the defendant shall give the plaintiff proper and adequate access to his premises, a court of equity on the completion of the improvements should not issue a mandatory injunction, for the work has been erected under the order of the court. *Ginsberg v. Wool-*

worth, 179 App. Div. 364, 166 N. Y. Supp. 494.

Access to water.—The owner of lands abutting on a public street in the village of West Sayville, which street leads to the waters of Great South bay, is entitled to a right of ingress and egress from and to the waters of the bay where they meet the highway at high-water mark. Hence, as a riparian owner she is entitled to an injunction requiring an oyster company, which has acquired the ownership of lands under said waters, to remove structures erected upon piles which obstruct the exercise of said riparian rights. Such riparian owner, who has also title to the middle of said street and extending to high-water mark, suffers special injury different from that of the general public which entitles her to an injunction. The requirement to show special injury in such case does not call for the proof of such exact amounts as might be necessary to recovery in an action for damages. A mandatory injunction to compel the removal of such obstruction will issue even though the defendant has invested large capital in its enterprise and will suffer loss. *Hard v. Blue Points Co.*, 170 App. Div. 524, 156 N. Y. Supp. 465.

8. *Wheelock v. Noonan*, 108 N. Y. 179; *Eno v. Christ*, 25 Misc. 24, 54 N. Y. Supp. 400; *Summerville Fruit Farms v. Petrassi Co.*, 124 Misc. 826,

The wilful encroachment of a wall on adjoining premises may be remedied by a mandatory injunction;⁹ but, if the trespass was not wilful, or if under the circumstances such relief would be a hardship or inequitable, or if the plaintiff is willing to accept damages in lieu of injunctive relief, the court may refuse the mandatory injunction and grant damages in lieu thereof.¹⁰ Thus, if there has been a practical location of a boundary line which has been unquestioned for many years, equity will not compel the removal of an encroaching wall.¹¹ A mandatory injunction may be refused where the plaintiff permitted the erection of the encroachment without objection and allowed it to stand unquestioned for many years.¹²

Equity will interpose, by mandatory injunction, to compel the restoration of running water to its natural channel, when wrongfully diverted therefrom.¹³ If the erection and maintenance of a dam at a certain height is unauthorized and an invasion of the plaintiff's rights, the court is authorized to render a mandatory judgment requiring the defendant to lower the dam.¹⁴

3. Damages in addition to injunctive relief.

In addition to injunctive relief, the plaintiff may properly be awarded money damages for the injuries he has sus-

209 N. Y. Supp. 367, affirmed, 217 App. Div. 722, 216 N. Y. Supp. 924. See also, *Donovan v. Kissena Park Corp.*, 181 App. Div. 737, 168 N. Y. Supp. 1035.

9. *Baron v. Korn*, 127 N. Y. 224; *Ackerman v. True*, 175 N. Y. 354; *Lyle v. Little*, 28 App. Div. 181, 50 N. Y. Supp. 947; *Crocker v. Manhattan L. Ins. Co.*, 61 App. Div. 226, 70 N. Y. Supp. 492; *Goldbacher v. Eggers*, 38 Misc. 36, 76 N. Y. Supp. 881, affirmed, 82 App. Div. 637, 84 N. Y. Supp. 1127, affirmed without opinion, 179 N. Y. 551.

10. *Lyle v. Little*, 28 App. Div. 181, 50 N. Y. Supp. 947; *Crocker v. Manhattan L. Ins. Co.*, 61 App. Div. 226, 70 N. Y. Supp. 492; *Goldbacher v. Eggers*, 38 Misc. 36, 76 N. Y. Supp. 881, affirmed, 82 App. Div. 637, 84 N.

Y. Supp. 1127, affirmed without opinion, 179 N. Y. 551; *McSorley v. Gomprecht*, 30 Abb. N. C. 412, 26 N. Y. Supp. 917.

11. *Blumenauber v. O'Conner*, 32 Misc. 17, 66 N. Y. Supp. 137, affirmed on opinion below, 62 App. Div. 618, 71 N. Y. Supp. 1133.

12. *Jacobus v. Willis*, 74 Misc. 591, 134 N. Y. Supp. 455.

13. *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191; *Amsterdam Knitting Co. v. Dean*, 13 App. Div. 42, 43 N. Y. Supp. 29, affirmed, 162 N. Y. 278; *Wright v. Syracuse, etc., R. Co.*, 49 Hun 445, 3 N. Y. Supp. 480, 23 St. Rep. 78, affirmed without opinion, 124 N. Y. 668.

14. *Rothery v. N. Y. Rubber Co.*, 90 N. Y. 30; *Little Falls Fibre Co. v. Ford & Son, Inc.*, 127 Misc. 834, 217 N. Y.

tained.¹⁵ The damages are allowed as an incident to the action, and hence the defendant is not entitled, as a matter of right, to have them fixed by a jury.¹⁶ And being incidental, they are not normally allowed if the plaintiff had no equitable cause of action at the time of the commencement of his suit.¹⁷ The damages are computed to the date of the trial, and are not limited, as in an action at law, to damages which have been sustained at the time of the commencement of the action.¹⁸ The fact that the amount of damages involves more or less of estimate and opinion, is no reason why they should not be fixed by the court.¹⁹ But, in the absence of any evidence of actual damages, the court should not allow exemplary damages.²⁰ In accord with the general rule, damages have been allowed in actions to restrain waste,²¹ pollution or diversion of waters,²² interference with

Supp. 534; *Wright v. Shanahan*, 61 Hun 264, 16 N. Y. Supp. 785.

15. *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423; *Pegram v. New York El. R. Co.*, 147 N. Y. 135; *Barnes v. Midland R. Terminal Co.*, 218 N. Y. 91; *Warren v. Parkhurst*, 105 App. Div. 239, 93 N. Y. Supp. 1009, affirmed, 186 N. Y. 45; *John D. Park, etc., Co. v. Hubbard*, 134 App. Div. 468, 119 N. Y. Supp. 347, affirmed, 198 N. Y. 136; *Brauman v. New York*, 190 App. Div. 498, 167 N. Y. Supp. 720, modified on other grounds, 227 N. Y. 25; *Weeks-Thorn Paper Co. v. Glenside Woolen Mills*, 64 Misc. 205, 118 N. Y. Supp. 1027; *Summerville Fruit Farms v. Petrossi Co.*, 124 Misc. 926, 209 N. Y. Supp. 367, affirmed, 217 App. Div. 722, 216 N. Y. Supp. 924; *Little Falls Fibre Co. v. Ford & Son, Inc.*, 127 Misc. 834, 217 N. Y. Supp. 534; *Fox v. Fitzsimmons*, 29 Hun 574, affirmed without opinion, 100 N. Y. 618; *Gillilan v. Norton*, 29 Super. Ct. (6 Rob.) 546, 33 How. Pr. 373; *Glover v. Manhattan Ry. Co.*, 51 Super. Ct. (19 J. & S.) 1.

16. *Comesky v. Postal Tel. Cable Co.*, 41 App. Div. 245, 58 N. Y. Supp. 467; *Peats Co. v. Bradley*, 166 App. Div. 267, 151 N. Y. Supp. 602.

17. *Peats Co. v. Bradley*, 166 App. Div. 267, 151 N. Y. Supp. 602.

18. *Comesky v. Postal Tel. Cable Co.*, 41 App. Div. 245, 58 N. Y. Supp. 467; *John D. Park, etc., Co. v. Hubbard*, 134 App. Div. 468, 119 N. Y. Supp. 347, affirmed, 198 N. Y. 136; *Brauman v. New York*, 190 App. Div. 489, 167 N. Y. Supp. 720, modified on other grounds 227 N. Y. 25; *Inderlied v. Whaley*, 85 Hun 63, 32 N. Y. Supp. 64, affirmed on opinion below, 156 N. Y. 658.

19. *Schrivver v. Village of Johnstown*, 71 Hun 232, 54 St. Rep. 573, 24 N. Y. Supp. 1083, affirmed, on opinion below, 148 N. Y. 758.

20. *Witkop, etc., Co. v. Great Atlantic, etc., Co.*, 69 Misc. 90, 124 N. Y. Supp. 956.

21. *Weatherby v. Wood*, 29 How. Pr. 404.

22. *Chipman v. Palmer*, 77 N. Y. 51; *Warren v. Parkhurst*, 105 App. Div. 239, 93 N. Y. Supp. 1009, affirmed, 186 N. Y. 45; *Schrivver v. Village of Johnstown*, 71 Hun 232, 54 St. Rep. 573, 24 N. Y. Supp. 1083, affirmed, on opinion below, 148 N. Y. 758; *Hammond v. Fuller*, 1 Paige 197.

easements,²³ infringement of a trade-mark,²⁴ or unfair competition.²⁵

In an action involving a temporary damage to real estate, the measure of damages is usually the depreciation in rental value.²⁶ If permanent damage is occasioned, the depreciation in the value of the fee is properly allowed.²⁷ In an action based on unfair competition loss of profits by the plaintiff may form the measure of damages.²⁸

If there is a concert of action or co-operation on the part of several wrongdoers, they may be jointly liable for damages. But, if the several defendants act severally in the commission of the wrong, the damages should not be assessed jointly, but should be apportioned among the several defendants according to the injury which each has inflicted.²⁹ No damages are allowed where the plaintiff himself has committed acts similar to those charged against the defendants and has thus contributed to the injuries.³⁰ But, although several persons may unite in the same action to remedy a wrong which is common to all, it has been held that they cannot recover their damages.³¹

4. Legal relief in lieu of equitable relief.

When an action is based solely on equitable grounds, and the complaint asks equitable relief only, if there was no foundation for equitable jurisdiction, the action will be dismissed, and it will not be retained for a determination as to whether the plaintiff is entitled to legal relief. That is to say, if a plaintiff bringing an action for an injunction had

23. *Brown-Brand Realty Co. v. Saks & Co.*, 126 Misc. 336, 214 N. Y. Supp. 230, affirmed, 218 N. Y. Supp. 706.

24. See, *supra*, VII-B-16, Trade-Marks and Trade-Names.

25. *Conviser v. Brownstone & Co.*, 209 App. Div. 584, 205 N. Y. Supp. 82.

26. *Pegram v. New York El. R. Co.*, 147 N. Y. 135; *Eno v. Christ*, 25 Misc. 24, 54 N. Y. Supp. 400; *Brown-Brand Realty Co. v. Saks & Co.*, 126 Misc. 336, 214 N. Y. Supp. 230, affirmed, 218 N. Y. Supp. 706; *Schrivver v. Village of Johnstown*, 71 Hun 232, 54 St. Rep. 573, 24 N. Y. Supp. 1083; affirmed on opinion below, 148 N. Y. 758.

27. *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423.

28. *Conviser v. Brownstone & Co.*, 209 App. Div. 584, 205 N. Y. Supp. 82.

29. *Chipman v. Palmer*, 77 N. Y. 51; *Warren v. Parkhurst*, 105 App. Div. 239, 93 N. Y. Supp. 1009, affirmed, 186 N. Y. 45; *Gallon v. Sussar*, 172 App. Div. 393, 158 N. Y. Supp. 895; *Reese v. City of Johnstown*, 45 Misc. 432, 92 N. Y. Supp. 728.

30. *Reese v. City of Johnstown*, 45 Misc. 432, 92 N. Y. Supp. 728.

31. *Burghen v. Erie R. Co.*, 123 App. Div. 204, 108 N. Y. Supp. 311.

no cause of action for such relief at the time of the institution of the suit, he cannot afterwards assert that he is entitled to damages as in an action at law.³² On the other hand, if his complaint contains facts sufficient to sustain an action at law as well as an action in equity, although he was not entitled to equitable relief, his complaint will not be dismissed because he prayed for the equitable relief, but his cause of action for legal relief will be sent to a jury for determination.³³

The situation is quite different in a case where the plaintiff was entitled to equitable relief at the time of the commencement of his suit, but the court, acting in its discretion or being guided by facts which have arisen during the pendency of the suit, denies equitable relief. In such a case the court has jurisdiction of the action, and can grant full relief according to equitable principles.³⁴ It may retain cognizance of the suit, and in lieu of the equitable relief sought, may grant relief in the form of damages.³⁵ Thus, the maintenance of a great public improvement will not be enjoined, but the damages sustained thereby may, at the option of the defendant, be fixed and allowed in lieu of injunctive relief.³⁶ Or, if the defendant has the right to acquire in condemnation proceedings the right which the

32. *Sadlier v. New York*, 185 N. Y. 408; *Ackerman v. Trustees of N. Y. & Brooklyn Bridge*, 10 App. Div. 22, 75 St. Rep. 810, 41 N. Y. Supp. 810; *Rosenheimer v. Standard Gaslight Co.*, 39 App. Div. 482, 57 N. Y. Supp. 330; *Arena, etc., Club v. McPartland*, 41 App. Div. 352, 58 N. Y. Supp. 477; *Peats Co. v. Bradley*, 166 App. Div. 267, 151 N. Y. Supp. 602; *D'Aversa v. Guido*, 213 App. Div. 355, 210 N. Y. Supp. 621, affirmed, 244 N. Y. 590; *American Ice Co. v. New York*, 51 Misc. 114, 100 N. Y. Supp. 748, affirmed, 122 App. Div. 888, 106 N. Y. Supp. 1115, reversed on other grounds, 193 N. Y. 673. *W. J. Johnston Co. v. Hunt*, 66 Hun 504, 21 N. Y. Supp. 314, affirmed, on opinion below, 142 N. Y. 621; *Ketchum v. Depew*, 81 Hun 278, 62 St. Rep. 757, 30 N. Y. Supp. 794. See also, *Dickinson v. Springer*, 246 N. Y. 203.

33. *Westergren v. Everett*, 218 App. Div. 172, 218 N. Y. Supp. 68.

34. *Rosenheimer v. Standard Gaslight Co.*, 39 App. Div. 482, 57 N. Y. Supp. 330.

35. *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; *Van Allen v. New York El. R. Co.*, 144 N. Y. 174; *Sadlier v. New York*, 185 N. Y. 408; *Lyle v. Little*, 28 App. Div. 181, 50 N. Y. Supp. 947; *Miller v. Edison Elec. Illum. Co.*, 66 App. Div. 470, 73 N. Y. Supp. 376; *Stillman v. Olean*, 184 App. Div. 323, 171 N. Y. Supp. 445, reversed on other grounds, 228 N. Y. 322; *Jacobus v. Willes*, 74 Misc. 591, 134 N. Y. Supp. 455; *Thompson v. Ft. Miller Pulp & Paper Co.*, 111 Misc. 477, 181 N. Y. Supp. 714, modified on other grounds, 195 App. Div. 271, 186 N. Y. Supp. 817.

36. *Lynch v. Metropolitan El. R. Co.*, 129 N. Y. 274; *Hunter v. Man-*

plaintiff claims to have been wrongfully invaded, the court may determine its value, and permit the defendant to pay such sum upon a conveyance of the right.³⁷ Relief in this form is sometimes granted although the defendant did not have the right of eminent domain, where the circumstances justify that exercise of the court's conscience.³⁸

If the wrongful acts have been discontinued before the trial of the action and there is but remote danger of a recurrence, injunctive relief is improper, but damages may be awarded for the injuries sustained.³⁹ If during the pendency of the suit the plaintiff's right has expired through lapse of time, the court may nevertheless retain the cause and make an award of damages.⁴⁰

5. Postponement of operation of injunction.

The effect of an injunction which would materially affect the interests of the public may be suspended to afford an opportunity to correct the evil of which complaint is made. This is particularly true when the defendant has the right of eminent domain and can acquire in condemnation proceedings the right which is violated.⁴¹ Thus, an injunction against a municipality forbidding it to discharge sewerage on the premises of the plaintiff, may be postponed for a period in order to allow the municipal officers to perfect

hattan R. Co., 141 N. Y. 281; *Sadlier v. New York*, 185 N. Y. 408; *Gallagher v. Kingston Water Co.*, 25 App. Div. 82, 49 N. Y. Supp. 250, affirmed, 164 N. Y. 602; *Duncan v. Nassau Electric R. Co.*, 127 App. Div. 252, 111 N. Y. Supp. 210; *Hellinger v. New York*, 181 App. Div. 254, 168 N. Y. Supp. 271; *Rider v. City of Amsterdam*, 31 Misc. 375, 65 N. Y. Supp. 579; *Mitchell v. White Plains*, 91 Hun 189, 36 N. Y. Supp. 935.

37. *O'Reilly v. New York El. R. Co.*, 148 N. Y. 347; *Shaw v. Rochester, Syracuse, etc., R. Co.*, 131 App. Div. 528, 115 N. Y. Supp. 1026; *Mitchell v. White Plains*, 91 Hun 189, 36 N. Y. Supp. 935.

38. *Crocker v. Manhattan L. Ins. Co.*, 61 App. Div. 226, 70 N. Y. Supp.

492; *Goldbacher v. Eggers*, 38 Misc. 36, 76 N. Y. Supp. 881, affirmed, 82 App. Div. 637, 84 N. Y. Supp. 1127, affirmed, without opinion, 179 N. Y. 551; *Equitable Life Assur. Soc. v. Brennan*, 30 Abb. N. C. 260, 24 N. Y. Supp. 784.

39. *Miller v. Edison Elec. Illum. Co.*, 66 App. Div. 470, 73 N. Y. Supp. 376; *Smith v. Ingersoll-Sargent Rock Drill Co.*, 7 Misc. 374, 27 N. Y. Supp. 907, reversed on other grounds, 12 Misc. 5, 33 N. Y. Supp. 70, affirmed, 155 N. Y. 677.

40. *Greenblatt v. Zimmerman*, 132 App. Div. 283, 117 N. Y. Supp. 18.

41. *Schwarzenbach v. Ononta Light etc., Co.*, 144 App. Div. 884, 129 N. Y. Supp. 384, modified on other grounds, 207 N. Y. 671.

some other system for sewerage disposal.⁴² A further extension of time may be granted, if sufficient cause therefor appears, but the defendant should pay the damages which have accrued to the plaintiff during the delay.⁴³ An injunction which would cause the discontinuance of railway service, will be suspended for a reasonable time to enable the company to acquire by agreement or condemnation the plaintiff's rights.⁴⁴ Similarly, an electric company may be allowed an extension before an injunction against it becomes effective.⁴⁵ Leniency of this character will also be extended to a private corporation, if the interests of justice commend such disposition of the case.⁴⁶ In an action to restrain the use of a corporate name similar to that of the plaintiff, the injunction may be postponed until the defendant has had an opportunity to change its name.⁴⁷

6. Enforcement of judgment.

The failure of a defendant to comply with the terms of an injunction granted against him can be punished by contempt proceedings under section 750, *et seq.* of the Judiciary Law.⁴⁸ The burden is upon the plaintiff to show a violation of the decree.⁴⁹ In order to punish for a violation of an injunction, the act complained of must be clearly embraced within the inhibited acts.⁵⁰ An unintentional or accidental violation of the injunction presents no case for contempt proceedings.⁵¹ While a municipal corporation may be guilty of contempt of court, it will not be so adjudged, unless it appears to have

42. *Sammons v. City of Gloversville*, 34 Misc. 459, 70 N. Y. Supp. 284, affirmed without opinion, 67 App. Div. 628, 74 N. Y. Supp. 1145, affirmed, 175 N. Y. 346; *Lawatsch v. City of Kingston*, 68 Misc. 236, 124 N. Y. Supp. 578; *Vic v. City of Rochester*, 46 Hun 607, 13 St. Rep. 31.

43. *Sponenburg v. Gloversville*, 96 App. Div. 157, 89 N. Y. Supp. 19; *Sponenburg v. City of Gloversville*, 46 Misc. 290, 94 N. Y. Supp. 264.

44. *Glover v. Manhattan Ry. Co.*, 51 Super. Ct. (19 J. & S.) 1. See also, *Shaw v. Rochester, Syracuse, etc., R. R. Co.*, 131 App. Div. 528, 115 N. Y. Supp. 1026.

45. *McCann v. Chasm Power Co.*,

151 App. Div. 304, 136 N. Y. Supp. 383, affirmed, 211 N. Y. 301.

46. *Weeks-Thorn Paper Co. v. Glenside Woolen Mills*, 64 Misc. 205, 118 N. Y. Supp. 1027.

47. *U. S. Mercantile Reporting Co. v. U. S. Mercantile Reporting & Collecting Assn.*, 21 Abb. N. C. 115.

48. See the Chapter on Contempt, *Fiero on Particular Actions and Proceedings*, vol. 1, page 555.

49. *Woodworth v. Village of Nunda*, 213 App. Div. 57, 211 N. Y. Supp. 284.

50. *Porous Plaster Co. v. Seabury*, 16 St. Rep. 35, 1 N. Y. Supp. 134, 28 Week. Dig. 486.

51. *Strawberry Island Co. v. Cowles*, 79 Misc. 279, 140 N. Y. Supp. 333.

acted in bad faith.⁵² It is not a necessary prerequisite to contempt proceedings that a copy of the decree should have been served upon the defendant. If he has knowledge thereof and disobeys its mandate, he may be guilty of civil contempt.⁵³ A person not a party to the action cannot ordinarily be guilty of contempt because he does not abide by the judgment.⁵⁴

7. Form of judgment to restrain infringement of trade-name.⁵⁵

(Caption and title.)

This action having duly come on for trial at a Special Term of the Supreme Court, Part IV thereof for trials, held in and for the County of New York, before the Hon. Samuel Greenbaum, one of the Justices of the Supreme Court; and a decision herein having been duly rendered by the said Justice in favor of the plaintiff and against the defendant; and the said Justice having duly made and filed his findings of fact and conclusions of law herein, wherein he finds that the plaintiff is entitled to a judgment granting an injunction against the defendant as hereinafter provided, with costs;

Now, on motion of Charles E. Kelley, attorney for the plaintiff, it is

Adjudged and decreed that the defendant Star Company, and its agents and employees and any affiliated person or corporation, be and it hereby is, and they hereby are, perpetually enjoined:

1. From using the words "Mutt and Jeff" or the word "Mutt" or "Jeff" as a name or trade-mark or in connection with cartoons.

2. From publishing and from advertising and offering for sale and from selling any cartoons not drawn by Harry C. Fisher, which are, however, drawn in imitation of Harry C. Fisher's cartoons of the cartoon characters "Mutt" and "Jeff" and so like the "Mutt" and "Jeff" cartoons drawn by Harry C. Fisher as to be likely to deceive the public into believing that the said imitation cartoons are Harry C. Fisher's genuine "Mutt" and "Jeff" cartoons

It is further adjudged and decreed:

3. That nothing in this judgment shall be construed as enjoining the Star Company from republishing any of the cartoons and the title and text accompanying each, respectively, which have been heretofore drawn by Harry C. Fisher and published by the Star Company in the New York "American"; or as restraining the Star Company from exercising any rights which it may possess by reason

52. *Sponenburg v. City of Gloversville*, 46 Misc. 290, 94 N. Y. Supp. 264.

53. *United States v. Sumner*, 127 Misc. 907, 217 N. Y. Supp. 645; *Koehler v. Farmers' & Drovers' Bank*, 14 Civ. Proc. 71, affirmed, 25 St. Rep.

222, 6 N. Y. Supp. 470, 17 Civ. Proc. R. 307, affirmed, 117 N. Y. 661.

54. *Strawberry Island Co. v. Cowles*, 79 Misc. 279, 140 N. Y. Supp. 333.

55. This form is adapted from that used in *Fisher v. Star Co.*, 231 N. Y. 414.

of its ownership of the copyright of certain of the "Mutt and Jeff" cartoons drawn by Harry C. Fisher which have been heretofore published.

4. That the defendant's counterclaim be and the same hereby is dismissed on the merits.

5. That the plaintiff, Harry C. Fisher, recover of the defendant, Star Company, the sum of Ninety Dollars (\$90), his costs and disbursements as taxed and have execution therefor.

8. Form of judgment to restrain violation of ordinance.⁵⁶

(Title.)

This action having been duly tried at an Equity Term of the Supreme Court, held at the Court House in the City of Rochester, in and for the County of Monroe, commencing on the 6th day of June, 1910, John M. Stull appearing as counsel for the plaintiff, and Percival D. Oviatt as counsel for the defendant, and the proofs of the parties having been taken and the arguments of the respective counsel heard; and the Court having made and filed its decision in which it directed that the plaintiff have judgment for the relief demanded in the complaint, with costs of the action:

Now, upon motion of William W. Webb, Corporation Counsel, attorney for the plaintiff, it is

Ordered and Adjudged that the defendant be, and hereby is, permanently restrained, prohibited and enjoined from a continuance of the unlawful acts specified in the complaint, and from aiding, abetting or directing his agents, servants and employees to engage in the collection of garbage, bones or kitchen refuse within the City of Rochester without a license from the Bureau of Health, as required by the Health Ordinance of said city.

Further Ordered and Adjudged that the plaintiff, The City of Rochester, recover of and from the defendant, Edward C. Gutberlett, the sum of one hundred and four dollars and thirty-one cents (\$104.31), as and for its costs as taxed, and that it have execution therefor.

G. Appeals.

1. In general.

An appeal from a final judgment may be taken to the Appellate Division under section 608 of the Civil Practice Act as a matter of right. An injunction granted at Special Term may be modified by the Appellate Division.⁵⁷ Under section 584 of the Civil Practice Act, the Appellate Division may direct a judgment for an injunction and remit the case to Special Term for the assessment of damages.⁵⁸

⁵⁶. This form is adapted from that used in *City of Rochester v. Gutberlett*, 211 N. Y. 309.

⁵⁷. *American Ice Co. v. Meckel*, 109 App. Div. 93, 95 N. Y. Supp. 1060.

⁵⁸. *United Paperboard Co. v. Iro-*

Subject to the limitations in sections 588 and 589 of the Civil Practice Act, an appeal may be taken to the Court of Appeals. If the determination of the court below was within its discretion, the Court of Appeals will not review its action;⁵⁹ but if an injunction has been granted in a case where as a matter of law the facts compel the conclusion that such relief should not have been granted, a question is presented for the Court of Appeals.⁶⁰ Or, if the court below has dismissed the action, not as a matter of discretion, but as a matter of law, the Court of Appeals may decide the question of law.⁶¹ Where the Appellate Division reverses a final judgment, makes new findings and directs judgment thereon, the Court of Appeals is no longer limited to a review of questions of law, but must review the facts found by the Appellate Division and its decision thereon.⁶²

2. Temporary injunctions.

The granting or withholding of an injunction *pendente lite* is discretionary,⁶³ and the Appellate Division will not interfere, save in exceptional cases, with exercise of this discretion by the court below.⁶⁴ But the Appellate Division has authority to review the discretion of the court below, and may reverse if it concludes that this discretion has been abused.⁶⁵ Even where the court below denies the application, the Appellate Division may reverse, but it is seldom that such a conclusion is reached.⁶⁶ The Court of Appeals will not generally review the determination of the court of original jurisdiction, as to the granting, continuing or dissolving of a temporary injunction.⁶⁷ But, if it appears upon

quoise Paper Co., 217 App. Div. 253, 217 N. Y. Supp. 762.

59. Gray v. Manhattan Ry. Co., 128 N. Y. 499; McClure v. Leacroft, 183 N. Y. 36.

60. McClure v. Leacroft, 183 N. Y. 36.

61. Smith v. City of Rochester, 92 N. Y. 463.

62. Forstmann v. Joray Holding Co., 244 N. Y. 22.

63. See, supra, X-D-7, Preliminary Injunctions.

64. Rochester, etc., R. Co. v. Monroe County Electric Belt Line Co., 78 App. Div. 38, 78 N. Y. Supp. 998; Morrell

v. Brooklyn Gas Co., 195 App. Div. 1, 185 N. Y. Supp. 883, reversed, 231 N. Y. 398; Schenck v. Underhill, 205 App. Div. 162, 199 N. Y. Supp. 606; Grill v. Wiswall, 82 Hun 281, 31 N. Y. Supp. 307; Proctor v. Soulier, 82 Hun 353, 31 N. Y. Supp. 472, 1 N. Y. Ann. Cas. 118.

65. Hart v. Ogdensburg, etc., R. Co., 48 St. Rep. 801, 20 N. Y. Supp. 913.

66. Henckel v. Stevens, 17 App. Div. 279, 45 N. Y. Supp. 678; Dutton & Co. v. Cupples, 117 App. Div. 172, 102 N. Y. Supp. 309.

67. VanDewater v. Kelsey, 1 N. Y. 533; Paul v. Munger, 47 N. Y. 469;

the face of the complaint that the plaintiff is not entitled to final relief, the granting of a preliminary injunction is an error of law which may be reviewed and corrected by the Court of Appeals.⁶⁸ And, where, in an order of the Appellate Division dissolving a temporary injunction, it is stated that it is made on the ground that the action cannot be maintained, a question of law is raised which is reviewable in the Court of Appeals.⁶⁹

H. Costs.

In an action of injunction the costs are discretionary under section 1476 of the Civil Practice Act.⁷⁰ This discretion is to be exercised by the Special Term, and the appellate courts will not ordinarily interfere.⁷¹ Ordinarily a defeated defendant who is found to have wilfully wronged the plaintiff, is charged with costs.⁷² But costs do not always follow the event of the cause, but are awarded or not, according to the justice of the case, in the sound discretion of the court.⁷³ They are not necessarily imposed on a defeated plaintiff, if he had probable cause for seeking the aid of the court.⁷⁴ If the injunction is refused as a matter of discretion, and the case is dismissed without prejudice to the maintenance of an action at law, or if damages are allowed in lieu of injunctive relief, costs may be refused.⁷⁵ An unsuccessful plaintiff may be allowed costs, where he had an equitable cause of action at the time of the commence-

People v. Schoonmaker, 50 N. Y. 499; *Pfohl v. Sampson*, 59 N. Y. 174; *Calkin v. Manhattan Oil Co.*, 65 N. Y. 557; *Young v. Campbell*, 75 N. Y. 525; *Selchow v. Baker*, 93 N. Y. 59; *Hatch v. Western Union Tel. Co.*, 93 N. Y. 640; *Strasser v. Moonelis*, 108 N. Y. 611; *Hudson River Tel. Co. v. Watervliet Turnp. etc., Co.*, 121 N. Y. 397; *Castoriano v. Dupe*, 145 N. Y. 250.

^{68.} *Selchow v. Baker*, 93 N. Y. 59; *Hatch v. Western Union Tel. Co.*, 93 N. Y. 640; *Strasser v. Moonelis*, 108 N. Y. 611; *Hudson River Tel. Co. v. Watervliet Turnp. Co.*, 121 N. Y. 397.

^{69.} *Anderson v. Anderson*, 112 N. Y. 104; *Birge v. Berlin Iron Bridge Co.*, 133 N. Y. 477.

^{70.} *Barnes v. Midland R. Terminal Co.*, 218 N. Y. 91; *Brown v. Britton*, 41 App. Div. 57, 58 N. Y. Supp. 353.

^{71.} *Low v. Hart*, 90 N. Y. 457; *Brown v. Britton*, 41 App. Div. 57, 58 N. Y. Supp. 353.

^{72.} *Taylor v. Carpenter*, 2 Sandf. Ch. 603, affirmed, 2 Sandf. Ch. 611, 11 Paige 292.

^{73.} *Nicoll v. Huntington*, 1 Johns. Ch. 166.

^{74.} *Nicoll v. Huntington*, 1 Johns. Ch. 166.

^{75.} *Goodhue v. Cameron*, 142 App. Div. 470, 127 N. Y. Supp. 120; *Davis v. Lambertson*, 56 Barb. 480.

ment of the suit, but subsequently arising circumstances result in a dismissal of the action.⁷⁶

An action of injunction is one in which an extra allowance of costs may properly be granted.⁷⁷ When the Appellate Division makes new findings of fact and a new and complete adjudication, it may grant an additional allowance to the appellant.⁷⁸ An additional allowance may be based upon the value of the right involved.⁷⁹ If the evidence produced at the trial does not develop the value, it may be shown upon a motion for an extra allowance.⁸⁰

76. *Mann v. City of Utica*, 44 How. Pr. 334.

77. *Miller v. Clary*, 147 App. Div. 255, 131 N. Y. Supp. 1129, 133 N. Y. Supp. 1101; *Little Falls Fibre Co. v. Ford & Son, Inc.*, 223 App. Div. 559, 229 N. Y. Supp. 445, affirmed, 249 N. Y. 495.

78. *Kaumagraph Co., v. Stampograph Co.*, 235 N. Y. 1.

79. *Lattimer v. Livermore*, 72 N. Y. 174; *Henderson Estate Co. v. Carroll*

Electric Co., 113 App. Div. 775, 99 N. Y. Supp. 365, affirmed, 139 N. Y. 531; *Miller v. Clary*, 147 App. Div. 255, 131 N. Y. Supp. 1129, 133 N. Y. Supp. 1101; *Little Falls Fibre Co. v. Ford & Son, Inc.*, 223 App. Div. 559, 229 N. Y. Supp. 445, affirmed, 249 N. Y. 495.

80. *Hayden v. Matthews*, 4 App. Div. 338, 74 St. Rep. 589, 38 N. Y. Supp. 905, affirmed, 158 N. Y. 735.

INTERPLEADER.

ARTICLE I.

Action of Interpleader.

	PAGE
A. Civil Practice Act, § 285. Action of interpleader.....	352
B. Civil Practice Act, § 286. Procedure in action of interpleader.....	352
C. Effect of statute.....	353
D. Nature of action.....	354
E. When suit in equity maintainable.....	354
1. In general	354
2. Claim by two or more persons.....	355
3. Defendants must claim the same thing.....	357
4. Absence of interest in plaintiff.....	357
5. Hazard to plaintiff in determining rightful claimant.....	358
6. Absence of remedy at law.....	360
7. Absence of collusion.....	360
8. Willingness of plaintiff to make deposit in court.....	361
F. Procedure	361
1. Parties	361
2. Complaint	362
3. Answer	362
4. Injunction <i>pendente lite</i>	363
5. Issues and judgment.....	363
6. Costs	365
G. Action in nature of interpleader.....	365

ARTICLE II.

Interpleader by Order.

A. Civil Practice Act, § 287. Interpleader in pending action.....	366
B. History and purpose of statute.....	367
C. When order is granted.....	368
1. In general	368
2. Actions to which statute applies.....	369
3. Inability of defendant to make deposit.....	369
4. Necessity that third person have a substantial claim.....	370
5. Conflicting claim must relate to same property.....	372
6. Interest of defendant in controversy.....	372
7. Discretion of court.....	373
8. Collusion	374
9. Debtor	375
10. Bailee	376
11. Bank	376
12. Insurance company	378
13. Claimants of brokerage commissions.....	379
14. Action of replevin.....	379

	PAGE
D. Power of local and inferior courts.....	380
E. Procedure	381
1. Affidavit for order.....	381
2. Notice of application for order.....	382
3. Delay in making application.....	383
4. The order	383
5. Effect of order.....	384
6. Judgment	385
7. Costs	386
8. Form of order of interpleader.....	386
9. Another form of order.....	386
10. Form of supplemental complaint.....	387

ARTICLE I.

ACTION OF INTERPLEADER.

A. Civil Practice Act, § 285. Action of interpleader.

When any sum of money shall be due and payable under or on account of a contract and the whole, or any part thereof exceeding fifty dollars in amount, shall be claimed or demanded by adverse claimants, the debtor may bring suit in any court having jurisdiction thereof and of the parties demanding judgment of interpleader and that the debtor be permitted to pay the amount of the debt into court and that such debtor upon such payment into court be discharged from any further liability to any of the parties to the action.

B. Civil Practice Act, § 286. Procedure in action of interpleader.

When service of the summons and complaint shall have been made upon all the claimants in an action of interpleader based on a contract under or on account of which a sum of money shall be due and payable, where the whole or any part thereof exceeds fifty dollars in amount, the plaintiff may make application, by petition or upon affidavits for an order permitting and directing the plaintiff to pay the amount of the debt into court and that the plaintiff upon the payment into court of the amount of the debt as required by the order be discharged from any further liability to any of the defendants in such action, and the court, upon satisfactory proof by affidavit or otherwise as the court may require of the facts alleged in the complaint and that the whole or part of the debt is claimed adversely by the defendants without any collusion on the part of the plaintiff and that the amount thereof is not in dispute, may make such an order upon such terms as to costs and disbursements payable out of the money so adversely claimed as to the court may seem just; and upon the payment into court of the amount of such debt and complying with the terms of such order, the plaintiff shall stand discharged from any further liability to any of the defendants in said action on account of such debt and contract. Notice of such application, together with copies of the papers upon which the same is made, shall be personally served on each of the defendants at least five and not more than fifteen days before the return day thereof.

C. Effect of statute.

Sections 285 and 286 of the Civil Practice Act are taken from section 820-a of the Code of Civil Procedure. This section was added to the statutory system of procedure in 1908.¹ Prior to this time, a suit for interpleader had for centuries been maintained in courts of equity. The courts have never clearly defined the effect which the statute has had upon the established remedy of interpleader. Apparently, no additional ground for relief is furnished, and no effort seems to have been made to curtail the scope of the earlier remedy. The procedure outlined in section 286 is, in some respects, different from that which formerly prevailed in actions of interpleader, yet the statutory procedure is permissive in form, and does not necessarily abrogate the practice which was formerly followed.

Formerly the plaintiff was discharged from liability to the parties by the decree adjudging the interpleader, but under the statutory procedure the discharge is effected by an order. To secure the order the plaintiff must show substantially the same matters as was formerly required for a judgment of interpleader. He must show that conflicting claims are made to a debt which he owes, that these claims are substantially to the same debt, that he has no interest in the controversy but stands indifferent as a stakeholder.² If the amount of the fund is in dispute or if he claims any beneficial interest therein, the order will not be granted.³ The strict rules which were applied in actions of interpleader before the adoption of the statute, have not been relaxed.⁴ At the time of the adoption of this statute, the section permitting interpleader by motion in an action by one of the claimants had been applied for many years, and the new statute, being in somewhat similar language to the earlier statute, is given a similar construction.⁵ Hence the order will not be granted unless the plaintiff shows that the claims of the defendants have a reasonable basis so that there is

1. *The City Court of New York* has jurisdiction of the action. *U. S. Mortgage & Trust Co. v. Vermilye*, 72 Misc. 375, 130 N. Y. Supp. 303.

2. *Empire Engineering Corp. v. Mack*, 217 N. Y. 85; *Hood Rubber Co. v. Banque Belge Pour L'Etranger*, 219 App. Div. 464, 219 N. Y. Supp. 639.

3. *Empire Engineering Corp. v. Mack*, 217 N. Y. 83.

4. *Pouch v. Prudential Insurance Co.*, 204 N. Y. 281; *Empire Engineering Co. v. Mack*, 217 N. Y. 85.

5. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281.

doubt as to which of the defendants is in the right.⁶ But the fact that the plaintiff erroneously failed to add interest to the amount of the debt, does not require a denial of the motion, for the court may require the plaintiff to deposit the interest in addition to the principal.⁷

D. Nature of action.

A bill of interpleader is defined to be, "a bill exhibited, when two or more persons claim the same debt or duty from the complainant by different or separate interests; and he, not knowing to which of the claimants he ought, of right, to pay or render it, fears that he may be damaged by the defendants (as by paying his money to the wrong hand), and therefore exhibits his bill of interpleader against them, praying that the court may judge between them, to whom the thing belongs, and that he may be indemnified. It claims no right in opposition to those claimed by the persons against whom the bill is exhibited, but only prays the decree of the court, to decide between the rights of those persons for the safety of the complainant."⁸

It is an action in equity.⁹ It is not an action *in rem*.¹⁰ The ancient remedy of interpleader was not abolished by section 287 of the Civil Practice Act authorizing the interpleading of a third party by motion.¹¹ And apparently resort may still be had to the remedy although a similar statutory remedy is afforded by sections 285 and 286 of the Civil Practice Act.

E. When suit in equity maintainable.

1. In general.

The elements which are necessary to authorize relief in an action of interpleader may be summarized as follows: (1) that two or more persons have preferred a claim against the plaintiff; (2) that they claim the same thing; (3) that

6. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Sulzberger v. Seklir*, 153 App. Div. 749, 138 N. Y. Supp. 691. Compare, *Western Commercial Travelers' Assn. v. Langeheineken*, 139 App. Div. 592, 124 N. Y. Supp. 182.

7. *Knights & Ladies of Honor v. Stapf*, 160 N. Y. Supp. 1051.

8. *Atkinson v. Manks*, 1 Cow. 691.

9. *Hasberg v. Moses*, 81 App. Div. 199, 80 N. Y. Supp. 967.

10. *Hanna v. Stedman*, 230 N. Y. 326.

11. *Beck v. Stephani*, 9 How. Pr. 193; *Patterson v. Perry*, 14 How. Pr. 505.

the plaintiff has no beneficial interest in the thing claimed; (4) that the plaintiff cannot determine, without hazard to himself, to which of the defendants the thing of right belongs; (5) that the plaintiff has no adequate remedy at law; (6) that no collusion exists between the plaintiff and either of the defendants; (7) that the plaintiff is willing to bring the thing claimed into court to be awarded to the party entitled as of right.¹²

2. Claim by two or more persons.

The first of the necessary elements of an action of interpleader is that two or more persons have made a claim against the plaintiff.¹³ A claim by but one person is not sufficient.¹⁴ In order that the action shall be within section 285 of the Civil Practice Act, the claim must be for a debt due and payable under or on account of a contract.¹⁵ The earlier equity remedy was not so closely confined. Thus, a suit for interpleader has been allowed where a person was taxed in two different places for the same property, and was in doubt as which was the proper tax district.¹⁶

As a general rule, there is actually a contract relation between the parties.¹⁷ Thus, if the other elements exist, an insurance company may maintain the action to determine who is entitled to the proceeds of a policy.¹⁸ Conflicting

12. *Dorn v. Fox*, 61 N. Y. 264; *Crane v. McDonald*, 118 N. Y. 648; *Bassett v. Leslie*, 123 N. Y. 396; *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Hasberg v. Moses*, 81 App. Div. 199, 80 N. Y. Supp. 867; *Redfield v. Supervisors of Genesee*, Clark, 42; *Atkinson v. Manks*, 1 Cow. 691.

13. *Dorn v. Fox*, 61 N. Y. 264; *Crane v. McDonald*, 118 N. Y. 648; *Bassett v. Leslie*, 123 N. Y. 396; *Hasberg v. Moses*, 81 App. Div. 199, 80 N. Y. Supp. 867; *Atkinson v. Manks*, 1 Cow. 691; *Wendstrom Electric Co. v. Bloomer*, 85 Hun 389, 66 St. Rep. 293, 32 N. Y. Supp. 903.

14. *American Telegraph, etc., Co. v. Day*, 52 Super. Ct. (20 J. & S.) 128.

15. *National Union Bank v. Kleinwort*, 15 App. Div. 478, 44 N. Y. Supp. 469.

16. *Dorn v. Fox*, 61 N. Y. 264; *Redfield v. Supervisors of Genesee*, Clark, 42; *Thomson v. Ebbets*, Hopk. Ch. 272; *Mohawk & Hudson R. Co. v. Clute*, 4 Paige, 384.

17. *Lottery Tickets*.—See, *Yates v. Tisdale*, 3 Edw. Ch. 75.

18. *Barry v. Mutual L. Ins. Co.*, 53 N. Y. 536; *McCabe v. McCabe*, 67 App. Div. 589, 73 N. Y. Supp. 852, 32 N. Y. Civ. Proc. Rep. 320; *Western Commercial Travelers' Assn. v. Langeheineken*, 139 App. Div. 592, 124 N. Y. Supp. 182; *Commercial Travelers' Assn. v. Newkirk*, 16 N. Y. Supp. 177; *Travelers' Ins. Co. v. Healey*, 28 N. Y. Supp. 478, 60 St. Rep. 151, reversed on other grounds, 86 Hun 524, 33 N. Y. Supp. 911.

claims to a bank deposit may justify an action of interpleader by the bank.¹⁹ Real estate brokers each claiming the commission for effecting a sale may be interpleaded,²⁰ although they claim under different contracts,²¹ provided the plaintiff has not rendered himself liable for double commissions. A bailee, unless the situation is such that he cannot dispute the title of his bailor,²² may maintain an action of interpleader to determine conflicting claims to the subject of the bailment.²³ Section 103 of the General Business Law specifically gives such a remedy to warehousemen.²⁴ And an action of interpleader may be maintained where there are two or more claimants to a judgment,²⁵ a mortgage,²⁶ corporate stock,²⁷ a reward,²⁸ or rents accruing

19. *Seaboard National Bank v. Reid*, 172 App. Div. 135, 158 N. Y. Supp. 250; *Matter of Videgaray*, 184 App. Div. 381, 170 N. Y. Supp. 874; *New York Trust Co. v. Braham*, 126 Misc. 462, 213 N. Y. Supp. 678; *White v. Bank of Angola*, 130 Misc. 99, 223 N. Y. Supp. 509; *German Exch. Bank v. Comm'rs of Excise*, 6 Abb. N. C. 394, 57 How. Pr. 187. See also, *United States Trust Co. v. Wiley*, 41 Barb. 477.

20. *Dardonville v. Smith*, 133 App. Div. 234, 117 N. Y. Supp. 216; *Fredenburg, etc., Co. v. Leventhal*, 211 App. Div. 246, 207 N. Y. Supp. 482; *Doyle v. Meeker*, 125 Misc. 105, 210 N. Y. Supp. 134.

21. *Dardonville v. Smith*, 133 App. Div. 234, 117 N. Y. Supp. 216. *Contra*, *McCreery v. Inge*, 49 App. Div. 133, 63 N. Y. Supp. 158.

22. *McGraw v. Adams*, 14 How. Pr. 461.

Receiptor to sheriff.—A party who is in the position of a receiptor to the sheriff, who has made a valid levy upon a certain stock of goods, and is, therefore, a bailee thereof cannot by filing a bill of interpleader compel other parties to come into court and litigate their claims with the sheriff. Such a party does not stand in the position of a person who has come into the possession of property innocently,

and has been unexpectedly assailed, without any instrumentality on his part, by different claimants of the property. *Cromwell v. Am. Loan & Trust Co.*, 57 Hun 149, 32 St. Rep. 947, 11 N. Y. Supp. 144.

23. *Ball v. Liney*, 48 N. Y. 6; *Beebe v. Mead*, 101 App. Div. 500, 92 N. Y. Supp. 51; *Manhattan S. & W. Co. v. Benguist Art Museum*, 155 App. Div. 196, 139 N. Y. Supp. 1073; *B. Altman & Co., v. Comstock*, 165 App. Div. 160, 150 N. Y. Supp. 662; *New Netherland Bank v. Boucheron Co.*, 122 Misc. 690, 203 N. Y. Supp. 766; *Mercantile Safe Deposit Co. v. Dimon*, 72 Hun 638, 55 St. Rep. 209, 25 N. Y. Supp. 383; *Wilson v. International R. Co.*, 160 N. Y. Supp. 367, affirmed, 177 App. Div. 946, 164 N. Y. Supp. 1118.

24. *Beebe v. Mead*, 101 App. Div. 500, 92 N. Y. Supp. 51.

25. *Bowsky v. Cosby*, 106 App. Div. 572, 94 N. Y. Supp. 792.

26. *Caulkins v. Bolton*, 31 Hun 458, affirmed, 98 N. Y. 511.

27. *American Press Assn. v. Brantingham*, 57 App. Div. 399, 68 N. Y. Supp. 285; *American Press Assn. v. Brantingham*, 37 Misc. 426, 75 N. Y. Supp. 765, affirmed, 75 App. Div. 435, 78 N. Y. Supp. 305; *New Netherland Bank v. Boucheron*, 122 Misc. 690, 203 N. Y. Supp. 766; *Cady v. Potter*, 55 Barb. 463.

from real estate.²⁹ Money due on a municipal contract,³⁰ or a private building contract,³¹ or commercial paper,³² may be involved in an action of interpleader.

3. Defendants must claim the same thing.

One of the circumstances necessary for relief in an action of interpleader is that the claimants are claiming the same thing.³³ If the claims are separate and distinct and have no inherent connection with each other, interpleader will not be permitted.³⁴ The action can be maintained only when there is a single liability; if there may be a liability to both claimants, the remedy cannot be invoked.³⁵

4. Absence of interest in plaintiff.

An interpleader is permitted only when the plaintiff is in the position of a stakeholder.³⁶ In other words, from a legal point of view, he must be indifferent as to which the adverse claimants will ultimately succeed.³⁷ His position is that he

28. *Fargo v. Arthur*, 43 How. Pr. 193.

29. *Seaman v. Wright*, 12 Abb. Pr. 304; *Badeau v. Tylee*, 1 Sandf. Ch. 270.

30. *City of New York v. Cody*, 44 Misc. 270, 89 N. Y. Supp. 886, affirmed, 95 App. Div. 632, 88 N. Y. Supp. 1094.

31. *Westervelt v. Levy*, 9 Super. Ct. (2 Duer) 354.

32. *Bell v. Hunt*, 3 Barb. Ch. 391.

33. *Dorn v. Fox*, 61 N. Y. 264; *Crane v. McDonald*, 118 N. Y. 648; *Bassett v. Leslie*, 123 N. Y. 396; *Empire Engineering Corp. v. Mack*, 217 N. Y. 85; *Brackett v. Graves*, 30 App. Div. 162, 51 N. Y. Supp. 895; *Hasberg v. Moses*, 81 App. Div. 199, 80 N. Y. Supp. 867; *New England Mut. Life Ins. Co. v. Keller*, 7 Civ. Proc. R. 109; *Delaware, etc., R. Co. v. Corwith*, 16 Civ. Proc. 312, 5 N. Y. Supp. 792; *Atkinson v. Manks*, 1 Cow. 691; *Wendstrom Electric Co. v. Bloomer*, 85 Hun 389, 66 St. Rep. 293, 32 N. Y. Supp. 903; *Bassett v. Leslie*, 32 St. Rep. 874, 10 N. Y. Supp. 483, affirmed, 123 N. Y. 396.

34. *Fulton Bank of Brooklyn v. Chase*, 2 Silv. Sup. Ct. 522, 25 St. Rep. 711, 6 N. Y. Supp. 126.

35. *Bassett v. Leslie*, 32 St. Rep. 874, 10 N. Y. Supp. 483, affirmed, 123 N. Y. 396.

36. *Bassett v. Leslie*, 123 N. Y. 396; *Brown v. Arbogast & B. Co.*, 162 App. Div. 603, 147 N. Y. Supp. 998; *Badeau v. Rogers*, 2 Paige 209.

A sheriff who by virtue of an execution levies upon property claimed by a third person, cannot file a bill of interpleader against such third person and the plaintiff in the execution, to have them settle the right to the property between themselves. *Shaw v. Coster*, 8 Paige 339.

37. *Empire Engineering Corp. v. Mack*, 217 N. Y. 85; *Brackett v. Graves*, 30 App. Div. 162, 51 N. Y. Supp. 895.

When not interested.—A depositary, holding money in dispute between several claimants should be allowed to pay such money into court and the claimants may be restrained from prosecuting actions against such de-

desires to retire from a threatened litigation in which he has no interest. If he disputes the claims of all the parties, or claims any part of the debt or property as his own, or claims any beneficial interest therein, a strict action of interpleader cannot be maintained.³⁸ But it is no objection to the maintenance of the suit that the plaintiff has an interest in respect to other property not in the suit, but which might be litigated, and the result of the suit in question may affect his interest in the other property.³⁹

5. Hazard to plaintiff in determining rightful claimant.

Equitable jurisdiction is based upon the theory that, if a third person is not a party to an action, ordinarily he is not bound by the determination of the court. After a debtor has once been compelled to pay an obligation, a third person claiming title to the obligation may institute an action and his action will be heard upon its merits.⁴⁰ It is to avoid this peril of injustice that equity assumes jurisdiction, brings into one action all of the claimants, and makes a determination binding on all of the parties.⁴¹ If the circumstances are such that the court can find that there is no hazard in

positary to recover the sum, in a case where such opposing claims rest upon doubtful questions of law and fact, which the depositary could not determine without hazard to itself. The fact that such depositary, when sued in a prior action by one of the claimants, interposed an answer denying his right to the fund, without a claim that it itself was entitled to retain it, does not show an interest in the controversy hostile to the claimant. *Mercantile Trust Co. v. Czylvet-Rogniat*, 46 Misc. 16, 93 N. Y. Supp. 238.

38. *Dorn v. Fox*, 61 N. Y. 264; *Dows v. Kidder*, 84 N. Y. 121; *Bassett v. Leslie*, 123 N. Y. 396; *Empire Engineering Corp. v. Mack*, 217 N. Y. 85; *Brackett v. Graves*, 30 App. Div. 162, 51 N. Y. Supp. 895; *Hasberg v. Moses*, 81 App. Div. 199, 80 N. Y. Supp. 867; *Mosier v. Kurchoff*, 51 Misc. 432, 101 N. Y. Supp. 643; *Wakeman v. Dickey*, 19 Abb. Pr. 24; *Howe Machine Co. v. Gifford*, 66 Barb. 597; *Delaware*, etc.,

R. Co. v. Corwith, 16 Civ. Proc. 312, 5 N. Y. Supp. 792; *Van Zandt v. Van Zandt*, 17 Civ. Proc. 448, 26 St. Rep. 963; *Atkinson v. Manks*, 1 Cow. 691; *New England Mut. Life Ins. Co. v. Odell*, 50 Hun 279, 2 N. Y. Supp. 873; *Wenstrom Electric Co. v. Bloomer*, 85 Hun 389, 66 St. Rep. 293, 32 N. Y. Supp. 903; *Shaw v. Coster*, 8 Paige 339; *Oppenheim v. Wolf*, 3 Sandf. Ch. 571, 4 N. Y. Leg. Obs. 259.

39. *Oppenheim v. Wolf*, 3 Sandf. Ch. 571, 4 N. Y. Leg. Obs. 259.

40. *Equity Gaslight Co. v. McKeige*, 139 N. Y. 237; *Gleason v. Northwestern Mut. L. Ins. Co.*, 203 N. Y. 507; *Reynolds v. Aetna Life Ins. Co.*, 6 App. Div. 254, 39 N. Y. Supp. 885; *Brown v. Brown*, 40 Hun 418; *Badeau v. Rogers*, 2 Paige 209.

41. *Crane v. McDonald*, 118 N. Y. 648; *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Hasberg v. Moses*, 81 App. Div. 199, 80 N. Y. Supp. 867.

recognizing one of the claimants as in the right, the action may be dismissed.⁴² Thus, a city cannot interplead rival claimants to the salary of a municipal office, for the city is protected by the payment to the *de facto* officer, and a *de jure* officer is required to bring suit against the *de facto* officer to recover the salary received by the latter.⁴³ Moreover, the title to office is to be tried in an action in the nature of *quo warranto*, not an action of interpleader.⁴⁴ To justify the action, not only must there be two claimants, but the claim of each must have a reasonable basis. In other words there must be a reasonable doubt as to which is in the right, and the plaintiff must be ignorant of the true rights of the parties.⁴⁵

A reasonable doubt as to which of the claimants is in the right may arise from a disputed question of fact, which the plaintiff cannot determine without hazard; or it may arise from a question of law which is not yet settled.⁴⁶ Whether there was sufficient doubt to justify the action is to be determined from the situation existing at the time of the commencement of the action, not necessarily as the case appeared at the time of the trial or a hearing in the appellate courts.⁴⁷

Where the perplexity and danger upon which the plaintiff

42. *Dorn v. Fox*, 61 N. Y. 264; *Baltimore & Ohio R. Co. v. Arthur*, 90 N. Y. 234; *Bassett v. Leslie*, 123 N. Y. 396; *Schuyler v. Pelissier*, 3 Edw. Ch. 191; *Buffalo Grape Sugar Co. v. Alberger*, 22 Hun 349; *Mohawk & Hudson R. Co. v. Clute*, 4 Paige 384.

43. *City of New York v. Voorhis*, 129 N. Y. Supp. 832.

44. *City of Buffalo v. Mackay*, 15 Hun 204. See also, *New York v. Flag*, 6 Abb. Pr. 296.

45. *Post v. Emmett*, 40 App. Div. 477, 53 N. Y. Supp. 129; *Sulzberger v. Seklir*, 153 App. Div. 749, 138 N. Y. Supp. 691; *Trigg v. Hitz*, 17 Abb. Pr. 436; *Morgan v. Fillmore*, 18 Abb. Pr. 217; *German Exch. Bank v. Comm'rs of Excise*, 6 Abb. N. C. 394, 57 How. Pr. 187; *Nassau Bank v. Yandes*, 44 Hun 55, 8 St. Rep. 415, 26 Week. Dig. 486; *Perkins v. Montgomery*, 70 N. Y. Supp. 136; *Nassau Bank v. Ritzenger*, 5 N. Y. St. 309, affirmed 44 Hun 55.

Compare, *Western Commercial Travelers' Assn. v. Langeheineken*, 139 App. Div. 592, 124 N. Y. Supp. 182.

"As all business is conducted with some risk, as every holder of money in the payment of it over always does so at some risk, the courts have receded from the rule that all that it is necessary to establish is that some claim had been presented and have held that it is necessary, in addition, to prove that such claim had some reasonable foundation, and that there was some reasonable doubt as to whether the stakeholder would be reasonably safe in the payment over of the money." *Nassau Bank v. Yandes*, 44 Hun 55, 8 St. Rep. 415, 26 Week. Dig. 486.

46. *Crane v. McDonald*, 118 N. Y. 648.

47. *Crane v. McDonald*, 118 N. Y. 648.

founds his action of interpleader arises out of an act done voluntarily and advisedly by him, it does not arise without his fault, and the action will not lie.⁴⁸ One who has in violation of an injunction incurred an obligation by which he is liable to be sued by different persons in reference to the same demand, is not in a position to ask the interposition of the court to award an issue to be tried between the claimants.⁴⁹

6. Absence of remedy at law.

As a general rule, equitable remedies are available only when there is an absence of any remedy at law, and if the circumstances allowed the plaintiff an adequate remedy without resort to an action of interpleader, the latter remedy was withheld.⁵⁰ The dilemma in which a debtor was placed by reason of conflicting claims was not relievable in an action at law. In an action at law to recover the debt, a third person claiming the obligation was not a proper party to be joined as a co-defendant with the alleged debtor.⁵¹ In an equitable action the court permitted the joinder of other claimants and there was no necessity for an independent action of interpleader.⁵² Or, if the conflicting claimants were all parties to an action so that they would be bound by the determination, it was not necessary to resort to an action of interpleader.⁵³ Now the practice has been liberalized and a claimant can be brought into the action at law on motion, but nevertheless the action of interpleader has survived.

7. Absence of collusion.

Collusion between the plaintiff and one of the defendants may result in a determination dismissing an action of inter-

48. *American Telegraph, etc., Co. v. Day*, 52 Super. Ct. (20 J. & S.) 128.

49. *Morgan v. Fillmore*, 18 Abb. Pr. 217.

50. *Brown v. Arbogast & B. Co.*, 162 App. Div. 603, 147 N. Y. Supp. 996; *Dry Dock Methodist Episcopal Church v. Carr*, 2 Barb. 60; *Howe Machine Co. v. Gifford*, 66 Barb. 597; *City of New York v. Voorhis*, 129 N. Y. Supp. 832.

51. *McCabe v. McCabe*, 67 App. Div. 589, 73 N. Y. Supp. 852, 32 N. Y. Civ. Proc. Rep. 320; *Brown v. Arbogast & B. Co.*, 162 App. Div. 603, 147 N. Y. Supp. 993.

52. *Lane v. New York L. Ins. Co.*, 56 Hun 92, 29 St. Rep. 952, 9 N. Y. Supp. 52.

53. *Lane v. N. Y. Life Ins. Co.*, 56 Hun 92, 29 St. Rep. 952, 9 N. Y. Supp. 52; *Badeau v. Rogers*, 2 Paige 209.

pleader.⁵⁴ When a demand is made upon a debtor he is not allowed to seek a third person to make a demand on him for the same obligation. Relief is allowed to the plaintiff because he has innocently been placed in the position of a stakeholder, with conflicting claims being asserted as to the ownership of the stake.

8. Willingness of plaintiff to make deposit in court.

The plaintiff, in order to avail himself of the remedy of interpleader, must express his willingness to deposit the debt in question in court.⁵⁵ If the thing in controversy consists of chattels, not money, he should be willing to have a receiver appointed to take the custody of the property. He must be in possession, either actually or constructively, of the disputed property.⁵⁶ If he claims an interest in the property and hence is unwilling to part therewith, he should seek some remedy other than interpleader. Or, if the circumstances are such that he is unable to make the deposit, relief by interpleader will be denied.⁵⁷

F. Procedure.

1. Parties.

The proper party plaintiff in an action of interpleader is the stakeholder. One of the conflicting claimants cannot maintain the action. It is brought against the several claimants. A person having an interest in the fund is a proper party defendant; and one having a claim to the fund or an interest therein, if not sued as a defendant, may be allowed to intervene.⁵⁸

54. *Crane v. McDonald*, 118 N. Y. 648; *Hasberg v. Moses*, 81 App. Div. 199, 80 N. Y. Supp. 867; *Beck v. Stephani*, 9 How. Pr. 193; *Wendstrom Electric Co. v. Bloomer*, 85 Hun 389, 66 St. Rep. 293, 32 N. Y. Supp. 903; *Atkinson v. Manks*, 1 Cow. 691; *Shaw v. Coster*, 3 Paige 339; *Marvin v. Ellwood*, 11 Paige 365.

55. *Crane v. McDonald*, 118 N. Y. 648; *Bassett v. Leslie*, 123 N. Y. 396; *Van Zandt v. Van Zandt*, 17 Civ.

Proc. R. 448, 26 St. Rep. 963; *Wendstrom Electric Co. v. Bloomer*, 85 Hun 389, 66 St. Rep. 293, 32 N. Y. Supp. 903; *Shaw v. Coster*, 8 Paige 339.

56. *Beck v. Stephani*, 9 How. Pr. 193.

57. *Finlay v. American Exchange Bank*, 11 How. Pr. 468.

58. *Edison Electric Illum. Co. v. Frick Co.*, 146 App. Div. 605, 131 N. Y. Supp. 125.

2. Complaint.

The complaint should state the facts indicating the necessary elements of the action, as stated above.⁵⁹ That is to say, it should contain allegations of facts showing that two or more persons have preferred a claim against the plaintiff; that they claim the same thing; that the plaintiff has no beneficial interest in the thing claimed; and that the plaintiff cannot determine, without hazard to himself, to which of the defendants the thing of right belongs.⁶⁰ It should appear that each of the conflicting claims has a reasonable basis so as to create a doubt as to which claimant is in the right.⁶¹ If facts are alleged sustaining these matters, it follows that the plaintiff has no adequate remedy at law, and it is probably unnecessary expressly to state this conclusion, though an allegation of this nature is usually incorporated in a complaint in an action in equity. The complaint should contain an offer on the part of the plaintiff to bring the debt or property into court.⁶² The early practice in equity permitted the absence of collusion between the plaintiff and either of the defendants to be shown by an affidavit annexed to the complaint, and the courts have never objected to this practice; but under modern practice it would seem preferable to incorporate that fact in the complaint itself.⁶³

3. Answer.

As against the plaintiff, either defendant may interpose an answer denying material allegations of the complaint or stating as a defense facts which would preclude the plaintiff

59. See, *supra*, I-E-1. When action in equity maintainable in general.

60. *Crane v. McDonald*, 118 N. Y. 648; *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Redfield v. Supervisors of Genesee*, Clark, 42.

Variance.—Where the parties who set up hostile claims to the same funds in the plaintiff's hands are in court by being interpleaded, a slight defect in the plaintiff's description of the successful one should not prejudice his claim, but the rights of the parties should be adjusted and finally settled.

Crane v. McDonald, 2 St. Rep. 150, affirmed, 118 N. Y. 648.

61. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281. See also, *Sulzberger v. Seklir*, 153 App. Div. 749, 138 N. Y. Supp. 691.

62. *Crane v. McDonald*, 118 N. Y. 648; *Bassett v. Leslie*, 123 N. Y. 396; *Van Zandt v. Van Zandt*, 17 Civ. Proc. 448, 26 State Rep. 963, 7 N. Y. Supp. 706; *Shaw v. Coster*, 8 Paige 339.

63. *Dorn v. Fox*, 61 N. Y. 268; *Crane v. McDonald*, 118 N. Y. 648; *Shaw v. Coster*, 8 Paige 339.

from relief. As between the defendants, they should serve cross-answers under section 264 of the Civil Practice Act. A defendant cannot take a default judgment against a co-defendant upon whom he has not served a copy of his answer.⁶⁴

4. Injunction pendente lite.

If the plaintiff's complaint states a cause of action, an injunction may be granted to stay further proceedings in an action commenced by one of the defendants.⁶⁵ An injunction, however, should be denied or vacated, if the complaint does not state a cause of action.⁶⁶ The courts of this State will not restrain the maintenance of an action in the federal courts.⁶⁷ The undertaking to be given by the plaintiff on an application for a temporary injunction is governed by section 893 of the Civil Practice Act. Section 884 is applicable only when the complaint demands judgment for a sum of money only, and hence does not regulate the practice in an action of interpleader.⁶⁸

5. Issues and judgment.

The issues between the plaintiff and the defendants are only as to the plaintiff's right to maintain the action.⁶⁹ If the circumstances were not such as to justify the action, it is dismissed.⁷⁰ These issues are determined before the questions between the defendants are considered.⁷¹ If the plaintiff has selected the proper remedy, judgment will be directed in his favor against the defendants.⁷² The answers of the

64. *New Netherland Bank v. Boucheron Co.*, 122 Misc. 690, 203 N. Y. Supp. 766.

65. *B. Altman & Co. v. Comstock*, 165 App. Div. 160, 150 N. Y. Supp. 662; *Seaboard National Bank v. Reid*, 172 App. Div. 135, 158 N. Y. Supp. 250; *U. S. Mortgage & Trust Co. v. Vermilye & Power*, 72 Misc. 375, 130 N. Y. Supp. 303; *Seaman v. Wright*, 12 Abb. Pr. 304; *Mercantile Safe Deposit Co. v. Dimon*, 72 Hun 638, 55 St. Rep. 209, 25 N. Y. Supp. 388.

66. *Brackett v. Graves*, 30 App. Div. 162, 51 N. Y. Supp. 895; *Delaware, etc. R. Co. v. Corwith*, 16 Civ. Proc. 312, 5 N. Y. Supp. 792.

67. *Schuyler v. Pelissier*, 3 Edw. Ch. 191.

68. *Seaboard National Bank v. Reid*, 172 App. Div. 135, 158 N. Y. Supp. 250.

69. *Kemp v. Dickinson*, 22 Hun 593; *National Bank of Commerce v. Irwin*, 97 N. Y. Supp. 234; *City Bank v. Bangs*, 2 Paige 570.

70. *Kemp v. Dickinson*, 22 Hun 593; *National Bank of Commerce v. Irwin*, 97 N. Y. Supp. 234.

71. *Kemp v. Dickinson*, 22 Hun 593.

72. *New Netherland Bank v. Boucheron Co.*, 122 Misc. 690, 203 N. Y. Supp. 766; *Washington Life Ins. Co. v. Lawrence*, 28 How. Pr. 435.

several defendants may present their respective claims and thus establish the plaintiff's right to judgment.⁷³ This judgment is sometimes referred to as an interlocutory judgment. It adjudges the right of interpleader, and decrees the discharge of the plaintiff from liability to either defendant as to the claim in controversy upon payment of the same into court.⁷⁴ Or, if the dispute involves chattels, a receiver may be appointed to take possession.⁷⁵ The plaintiff may insist on remaining in the action until he is discharged from liability.⁷⁶

Under the old equity practice this relief was procured by the plaintiff by decree, and prior to the determination of the issues an order would not be granted permitting the deposit in court.⁷⁷ But, in a proceeding under sections 285 and 286 of the Civil Practice Act, an interlocutory judgment in favor of the plaintiff is not so necessary, as the statute authorizes an order for the deposit in court.⁷⁸ This order may be made, although the allegations of the complaint are denied, if the moving papers satisfy the court that the plaintiff is right in his position.⁷⁹

As between the defendants, their cross answers determine the issues to be tried. The action is in equity, a jury is not demandable as a matter of right. The final judgment determines the rights of the defendants in the deposit, and makes directions for its application.⁸⁰

73. *Crane v. McDonald*, 118 N. Y. 648; *Balchen v. Crawford*, 1 Sandf. Ch. 380.

74. *Edison Electric Illuminating Co. v. Frick Co.*, 146 App. Div. 605, 131 N. Y. Supp. 125; *Commercial Travelers' Assn. v. Newkirk*, 16 N. Y. Supp. 177.

75. *Manhattan S. & W. Co. v. Ben-guist Art Museum*, 155 App. Div. 196, 139 N. Y. Supp. 1073.

76. *Bosky v. Cosby*, 106 App. Div. 572, 94 N. Y. Supp. 792.

77. *Washington Life Ins. Co. v. Lawrence*, 28 How. Pr. 435.

78. Interest added.—The fact that plaintiff in his application for the order does not add interest to the

amount of the deposit, does not require a denial of the application, but the order will be granted permitting the plaintiff to deposit both the principal and interest. *Knights & Ladies of Honor v. Stapf*, 160 N. Y. Supp. 1051.

The moving papers must show that there is a reasonable basis for the claims of the defendants to the deposit. *Sulzberger v. Seklir*, 153 App. Div. 749, 138 N. Y. Supp. 691.

79. *U. S. Mortgage & Trust Co. v. Vermilye*, 72 Misc. 375, 130 N. Y. Supp. 303.

80. *Richards v. Salter*, 6 Johns. Ch. 445.

6. Costs.

An action of interpleader is of an equitable nature, and hence costs are in the discretion of the court under section 1477 of the Civil Practice Act. Under the early equity practice, it was customary to allow the plaintiff his costs to be deducted from the fund deposited in court.⁸¹ But the plaintiff was allowed costs only when the suit was necessarily and properly commenced.⁸² At that time there was no remedy available to the plaintiff except the action of interpleader. Now, one who has innocently found himself in the position of a stakeholder with conflicting claims to the stake may await an action by one claimant, and then interplead the adverse claimant by motion. The fact that the stakeholder has an inexpensive remedy for the protection of his rights should preclude, or at least limit, the costs to be awarded to him.

The unsuccessful claimant may well be charged with the costs of the plaintiff as well as those of the successful defendant.⁸³ These costs may include the costs of the co-defendant in his action at law before the commencement of the action of interpleader.⁸⁴

G. Action in nature of interpleader.

There will be found in the decisions statements indicating a distinction between a strict action of interpleader and an action in the nature of interpleader. The difference has been said to lay in the fact that in the latter action equitable relief is sought in addition to that usually asked in a strict action of interpleader.⁸⁵ The circumstances of a particular controversy may be such that one cannot maintain a strict action of interpleader, and yet be such that he has no adequate remedy at law. It may then be permissible to bring an equitable action, which, having some features similar to an action of interpleader, may be termed an

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| <p>81. <i>Atkinson v. Manks</i>, 1 Cow. 691;
 <i>Canfield v. Morgan</i>, Hopk. Ch. 224;
 <i>Richards v. Salter</i>, 6 Johns. Ch. 445;
 <i>Aymer v. Gault</i>, 2 Paige 284.
 82. <i>Badeau v. Rogers</i>, 2 Paige 209;
 <i>Atkinson v. Manks</i>, 1 Cow. 691.
 83. <i>Miller v. Depeyster</i>, 1 Abb. Pr. 234;
 <i>Richards v. Salter</i>, 6 Johns. Ch.</p> | <p>445; <i>Miller v. Watts</i>, 11 Super. Ct. (4 Duer) 203.
 84. <i>Miller v. DePeyster</i>, 1 Abb. Pr. 234;
 <i>Miller v. Watts</i>, 11 Super. Ct. (4 Duer) 203.
 85. <i>New England Mut. Life Ins. Co. v. Odell</i>, 50 Hun 279, 2 N. Y. Supp. 873.</p> |
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action in the nature of interpleader.⁸⁶ In an action in the nature of interpleader, the plaintiff, as a rule, remains in the case to the end.⁸⁷ If a stakeholder claims any interest in the property in question he cannot maintain an action of interpleader, yet the situation may be such as to authorize him to bring an action in the nature of interpleader which will determine the rights of the parties.⁸⁸ If the amount of the stake is uncertain, or if the stakeholder is unable to deposit it in court, and there are other grounds justifying an exercise of equitable power, a proper case may be presented for an action in the nature of interpleader.⁸⁹ Only the stakeholder is permitted to maintain a strict interpleader, yet one of the claimants, if the case presents other equitable features, may maintain against the stakeholder and other claimants an action in the nature of interpleader.⁹⁰ But some additional feature of equity jurisdiction must be present, for a court of equity will not assume cognizance of the controversy merely because conflicting claims are made to the property.⁹¹ In a strict action of interpleader, only legal rights are enforced, but in an action in the nature of interpleader, equitable relief in addition is sometimes given.⁹²

ARTICLE II.

INTERPLEADER BY ORDER.

A. Civil Practice Act, § 287. Interpleader in pending action.

A defendant against whom an action to recover upon a contract or an action of ejectment or an action to recover a chattel is pending at any time before answer upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him may apply to the court upon notice to that person and the adverse party for an order to substitute that person in his place and to discharge him from liability to either, on his paying into court the amount of the debt or delivering the possession of the property or its value to such person as the court

86. *Dorn v. Fox*, 61 N. Y. 264; *Saratoga County v. Deyoe*, 77 N. Y. 219.

87. *Empire Engineering Corp. v. Mack*, 217 N. Y. 85.

88. *McHenry v. Hazard*, 45 N. Y. 580.

89. *Mohawk & Hudson R. Co. v. Clute*, 4 Paige 384. See also, *Finlay v. American Exchange Bank*, 11 How. Pr. 468.

90. *Hasberg v. Moses*, 81 App. Div. 199, 80 N. Y. Supp. 867. Compare, *Brown v. Arbogast & B. Co.*, 162 App. Div. 603, 147 N. Y. Supp. 998.

91. *Empire Engineering Corp. v. Mack*, 217 N. Y. 85.

92. *New England Mut. L. Ins. Co. v. Odell*, 50 Hun 279, 2 N. Y. Supp. 873.

directs; or, upon it appearing that the defendant disputes in whole or in part the liability as asserted against him by different claimants or that he has some interest in the subject-matter of the controversy which he desires to assert, his application may be for an order joining the other claimant or claimants as co-defendants with him in the action. The court, in its discretion, may make such order upon such terms as to cost and payments into court of the amount of the debt or part thereof or delivery of the possession of the property or its value or part thereof as may be just, and thereupon the entire controversy may be determined in the action.

B. History and purpose of statute.

Previous to 1851, interpleader was allowed only in courts of chancery in a suit brought for that purpose. In 1851, a paragraph was added to section 122 of the Code of Civil Procedure authorizing such relief by order in an action at law.⁹³ Substantially the same provision was contained in section 820 of the Code of Civil Procedure, and upon the adoption of the Civil Practice Act the remedy was continued by section 287.

The statutory provision for interpleader by order, upon motion, was not intended to create a new ground for interpleader, but to enable a person sued on a claim where an action of interpleader could be brought, to bring the third person, making a claim to the fund or property into court in a summary way, without the expense and delay to the stakeholder that would result from an action of interpleader. It is not a new, but a concurrent and more simple remedy.⁹⁴ In the absence of statutory authority, common law courts had no power to substitute a third person as a party in the place of the defendant.⁹⁵ The remedy of the defendant was a suit in interpleader on the equity side of the court, with an injunction against the continuance of the action at law.

93. *Greenblatt v. Mendelsohn*, 46 Misc. 554, 92 N. Y. Supp. 963.

94. *Barry v. Mutual L. Ins. Co.*, 53 N. Y. 536; *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Windecker v. Mut. Life Ins. Co.*, 12 App. Div. 73, 43 N. Y. Supp. 358; *Helene v. Corn Exch. Bk.*, 96 App. Div. 392, 89 N. Y. Supp. 310; *Cosgriff v. Hudson City Sav. Inst.* 24 Misc. 4, 52 N. Y. Supp. 189, 27 N. Y. Civ. Proc. 263; *Howe Machine Co. v. Gifford*, 66 Barb. 597; *Pustet v. Flannelly*, 60 How. Pr. 67; *Wilson v. Law-*

rence, 8 Hun 593; *Schell v. Lowe*, 75 Hun 43, 58 St. Rep. 179, 23 Civ. Proc. 300, 26 N. Y. Supp. 991; *Wendstrom Electric Co. v. Bloomer*, 85 Hun 389, 66 St. Rep. 293, 32 N. Y. Supp. 903; *DuBois v. Union Dime Savings Institution*, 89 Hun 382, 69 St. Rep. 782, 25 Civ. Proc. 288, 2 Ann. Cas. 221, 25 N. Y. Supp. 397.

95. *Jacobs v. Leiberman*, 51 App. Div. 542, 64 N. Y. Supp. 953; *Bullowa v. Provident Life & Trust Co.*, 125 App. Div. 545, 109 N. Y. Supp. 1058.

In England a statute had been enacted permitting the substitution of a third person in an action at law, and the practical advantage of the procedure was obvious.⁹⁶ The New York statute, as well as the English law, were not intended to introduce a new cause for interpleader, but merely to provide a practical, summary remedy which one could use as a substitute for the cumbersome and expensive remedy in equity.⁹⁷

The summary remedy is not an independent special proceeding, but is a motion in the pending action.⁹⁸

C. When order is granted.

1. In general.

As the interpleader by motion was intended merely as a summary substitute for the ancient equity suit of interpleader, the remedy is available, as a general rule, only in those cases where relief was permitted in courts of chancery.⁹⁹ The right of a defendant to compel rival claimants to be brought into an action by motion depends upon the same principles as the right to maintain an action of interpleader to compel rival claimants to litigate as between themselves.¹ The facts essential for the relief, as a general rule, are, that two or more persons have a claim against the defendant, that they claim the same thing, that the defendant has no interest in the thing claimed, and that he cannot determine without hazard to himself to which of such persons the thing belongs, that there is no collusion between

96. See 1 & 2 Wm. IV, Ch. 58.

97. *Cosgriff v. Hudson City Sav. Inst.*, 24 Misc. 4, 52 N. Y. Supp. 189, 27 N. Y. Civ. Proc. 263; *Vosburgh v. Huntington*, 15 Abb. Pr. 254; *Wendstrom Electric Co. v. Bloomer*, 85 Hun 389, 66 St. Rep. 793, 32 N. Y. Supp. 903; *Sherman v. Partridge*, 11 Super. Ct. (4 Duer) 646, 1 Abb. Pr. 256, 11 How. Pr. 154.

98. *Bowery Sav. Bank v. Mahler*, 45 Super. Ct. (13 J. & S.) 619.

99. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Cosgrif v. Hudson City Sav. Inst.*, 24 Misc. 4, 52 N. Y. Supp. 189, 27 Civ. Proc. 263; *Vosburgh v. Huntington*, 15 Abb. Pr. 254; *Howe Ma-*

chine Co. v. Gifford, 66 Barb. 597; *Delancy v. Murphy*, 24 Hun 503; *Wendstrom Electric Co. v. Bloomer*, 85 Hun 389, 66 St. Rep. 293, 32 N. Y. Supp. 903; *Venable v. N. Y. Bowery Fire Ins. Co.*, 49 Super. Ct. (17 J. & S.) 481.

1. *Stevenson v. N. Y. Life Ins. Co.*, 10 App. Div. 233, 41 N. Y. Supp. 96, 75 St. Rep. 1340; *Wells v. National City Bank*, 40 App. Div. 498, 58 N. Y. Supp. 125, 29 N. Y. Civ. Proc. 158; *DuBois v. Union Dime Savings Inst.*, 39 Hun 382, 69 St. Rep. 782, 25 Civ. Proc. 288, 2 Ann. Cas. 221, 25 N. Y. Supp. 397.

him and any of the parties, and that he will bring the thing claimed into court.² The controversy should involve a question of title. If the defendant is liable to the plaintiff on any ground independent of title, it would be unjust to the plaintiff to have a third person substituted as defendant.³

2. Actions to which statute applies.

By its terms section 287 of the Civil Practice Act is limited to an action to recover upon a contract or any action of ejectment or replevin.⁴ Hence it is inapplicable to a tort action, such as one for wrongful conversion.⁵ An order of interpleader will ordinarily not be issued where the defendant is wrongdoer as to either party.⁶ The statute does not provide a rule for equitable actions, for in such actions the court, independently of statutory provision, may bring in additional parties and dismiss the complaint as to such as are unnecessary.⁷ But an order of substitution is said to be proper in an action for money had and received.⁸

3. Inability of defendant to make deposit.

Under the terms of the statute the third party is brought in as a substitute for the defendant, upon the defendant paying into court the amount of the debt or delivering possession of the property, etc. If the defendant is not in a position

2. *Stevenson v. N. Y. Life Ins. Co.*, 10 App. Div. 233, 41 N. Y. Supp. 96, 75 St. Rep. 1340; *Kirsop v. Mut. Life Ins. Co.*, 87 App. Div. 170, 84 N. Y. Supp. 95, appeal dismissed in 178 N. Y. 603; *Boskowitz v. Boskowitz*, 124 App. Div. 849, 109 N. Y. Supp. 490; *Brook v. Randolph*, 201 App. Div. 30, 193 N. Y. Supp. 565; *Schell v. Lowe*, 75 Hun 43, 58 St. Rep. 179, 23 Civ. Proc. 300, 26 N. Y. Supp. 991; *Sherman v. Partridge*, 11 Super. Ct. (4 Duer) 646, 1 Abb. Pr. 256, 11 How. Pr. 154.

3. *Sherman v. Partridge*, 11 Super. Ct. (4 Duer) 646, 1 Abb. Pr. 256, 11 How. Pr. 154.

4. **Salary of public officer.**—The right to the prospective emoluments of a public office is not a matter of contract, and an action to recover the

salary of a public office under an assignment thereof, is, in its nature, *quasi ex contractu*, but is not an action "upon a contract" within the meaning of the statute; and, in an action by the assignor against the city to recover the salary, a motion to bring in the assignee as a party defendant will be denied. *Walker v. City of New York*, 72 Misc. 97, 129 N. Y. Supp. 1059.

5. *LaFemina v. Arsene*, 69 App. Div. 285, 74 N. Y. Supp. 749.

6. *Dodge v. Lawson*, 22 Civ. Proc. 112, 19 N. Y. Supp. 904.

7. *Lane v. N. Y. Life Ins. Co.*, 56 Hun 92, 29 St. Rep. 952, 9 N. Y. Supp. 52.

8. *American Trust & Savings Bank v. Thalheimer*, 29 App. Div. 170, 51 N. Y. Supp. 813.

to do this, he is not entitled to the order.⁹ If the claim of the plaintiff is unliquidated, it may be impossible to fix on a motion the amount to be paid into court, and hence the motion for interpleader may be denied.¹⁰

4. Necessity that third person have a substantial claim.

A third person will not be substituted for the defendant, unless he has made some claim to the property which is the subject of the action.¹¹ Moreover, as a general rule, it must appear that the claim of the person sought to be impleaded has some reasonable foundation.¹² A mere demand or a

9. *Vosburgh v. Huntington*, 15 Abb. Pr. 254; *Pelham Hod Elevating Co. v. Baggaley*, 34 St. Rep. 691, 12 N. Y. Supp. 218.

10. *Chamberlain v. O'Connor*, 1 E. D. Smith, 665, 8 How. Pr. 45.

11. *Brown Shoe Co. v. Vandam Warehouse Co.*, 186 App. Div. 718, 175 N. Y. Supp. 68; *Cosgriff v. Hudson City Sav. Inst.*, 24 Misc. 4, 52 N. Y. Supp. 189, 27 Civ. Proc. 263; *Delaney v. Murphy*, 24 Hun 503.

12. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Stevenson v. N. Y. Life Ins. Co.*, 10 App. Div. 233, 41 N. Y. Supp. 96, 75 St. Rep. 1340; *Burritt v. Press Publishing Co.*, 19 App. Div. 609, 49 N. Y. Supp. 295; *Southwark National Bank v. Childs*, 39 App. Div. 560, 57 N. Y. Supp. 739; *Kreiser v. City of N. Y.*, 46 App. Div. 16, 61 N. Y. Supp. 329; *Steiner v. East River Sav. Inst.*, 60 App. Div. 232, 70 N. Y. Supp. 223, 32 N. Y. Civ. Proc. 42; *Lateer v. Prudential Ins. Co.*, 64 App. Div. 423, 72 N. Y. Supp. 235; *Hinsdale v. Bankers' Life Ins. Co.*, 72 App. Div. 180, 76 N. Y. Supp. 448; *Chapuis v. Long*, 77 App. Div. 272, 78 N. Y. Supp. 1046; *Hanna v. Manufacturer's Trust Co.*, 104 App. Div. 90, 93 N. Y. Supp. 304; *McNamara v. Knights of Columbus*, 206 App. Div. 364, 201 N. Y. Supp. 235; *Lennon v. Metropolitan Life Ins. Co.*, 20 Misc. 403, 45 N. Y. Supp. 1033; *Cosgrif v. Hudson City Sav. Inst.*, 24 Misc. 4, 52 N. Y. Supp. 189, 27 Civ.

Proc. 263; *Freda v. Montauk Co.*, 26 Misc. 199, 55 N. Y. Supp. 748; *Cohen v. Cohen*, 35 Misc. 206, 71 N. Y. Supp. 481; *Michigan Sav. Bk. v. Coy, Hunt & Co.*, 45 Misc. 40, 90 N. Y. Supp. 814; *Allen v. Quackenbush*, 48 Misc. 627, 96 N. Y. Supp. 198; *Mitchell v. Catlin & Powell Co.*, 71 Misc. 450, 128 N. Y. Supp. 692; *Cross & B. Co. v. Ludin Realty Co.*, 90 Misc. 606, 134 N. Y. Supp. 26; *Vyne v. Mosson*, 92 Misc. 447, 156 N. Y. Supp. 274; *Pustet v. Flannelly*, 60 How. Pr. 67; *Stock, Grain & Provision Co. v. Haight*, 95 N. Y. Supp. 71; *Singer v. New York L. Ins. Co.*, 160 N. Y. Supp. 442; *Williams v. Aetna Life Ins. Co.*, 8 St. Rep. 567; *Feldman v. Grand Lodge of the Order of United Workmen*, 46 St. Rep. 122, 22 Civ. Proc. 165, 19 N. Y. Supp. 73. "The rule is well established that a plaintiff has a right to select the defendant whom he desires to sue, and however reluctant the latter may be to remain in the action, he has no right without good cause shown to apply to the court and, against the plaintiff's protest, have another and different defendant substituted in his stead. Undoubtedly where good grounds are stated, requiring such substitution or necessitating that there should be an interpleader in the action, the court has power, but only upon a showing that it is necessary, to substitute in place of the one selected by the plaintiff, another and different party

written notice of claim is not sufficient without facts.¹³ At one time it was thought that any claim would justify the order, as a stakeholder was thought to be entitled to be removed from the shadow of a risk, but for many years this rule has not prevailed.¹⁴ Moving papers which merely state that the third person has made a claim, without stating facts to show its weight, do not justify an order of interpleader.¹⁵ If the court is of the opinion that the claim of the third party is not so substantial as to place the defendant in danger of a double liability, the application may be denied.¹⁶ The defendant need not show that the third person will probably succeed in establishing his claim, it being sufficient to show that the claim has a reasonable basis.¹⁷ The defendant is not required at his peril to decide close questions of fact or nice questions of law, for it is sufficient that there is a reasonable doubt as to which claimant is in the right.¹⁸

The rule requiring the claim of the third party to be substantial is for the benefit of the plaintiff in the action. The third party, after having made a claim upon the defendant, cannot assert that there was no reasonable foundation for

defendant. The essentials required for an order of interpleader have been many times stated." *Chapuis v. Long*, 77 App. Div. 272, 78 N. Y. Supp. 1046.

13. *Wells v. National City Bank*, 40 App. Div. 498, 58 N. Y. Supp. 125, 29 Civ. Proc. 158; *Steiner v. East River Sav. Inst.*, 60 App. Div. 232, 70 N. Y. Supp. 223, 32 N. Y. Civ. Proc. 42; *Hanna v. Manufacturer's Trust Co.*, 104 App. Div. 90, 93 N. Y. Supp. 304.

14. *Beck v. Stephani*, 9 How. Pr. 193; *Drayfus v. Casey*, 23 St. Rep. 397, 52 Hun 95, 5 N. Y. Supp. 605. "The old rule that a stakeholder is entitled to be removed beyond the shadow of a risk, and that in order to entitle him to the protection of the court it is only necessary to establish that suits have been brought or that claimants have threatened to bring them, no longer prevails, and it is now necessary to prove that such claim has some reasonable foundation, and that there exists some reasonable doubt as

to whether or not the stakeholder would be reasonably safe in paying over the money." *Cosgrif v. Hudson City Sav. Inst.*, 24 Misc. 4, 52 N. Y. Supp. 189, 27 Civ. Proc. 263.

15. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Roberts v. Van Horne*, 21 App. Div. 369, 47 N. Y. Supp. 448; *Mars v. Albany Savings Bank*, 69 Hun 398, 53 St. Rep. 144, 23 N. Y. Supp. 658.

16. *Baltimore & Ohio R. Co. v. Arthur*, 90 N. Y. 234; *Michigan Sav. Bk. v. Coy, Hunt & Co.*, 45 Misc. 40, 90 N. Y. Supp. 814; *Sultzbacher v. National Shoe & Leather Bank*, 52 Super. Ct. (20 J. & S.) 269.

17. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Burritt v. Press Publishing Co.*, 19 App. Div. 609, 49 N. Y. Supp. 295; *Bowery National Bank v. Mayor, etc.*, 4 St. Rep. 565.

18. *Merchant v. Northwestern Mut. Life Ins. Co.*, 57 App. Div. 375, 68 N. Y. Supp. 406.

his claim and that he should not be brought into the action. All that he can insist upon is that, before he is brought in, it should appear that there was a reasonable foundation for the plaintiff's claim.¹⁹

5. Conflicting claim must relate to same property.

An order of interpleader is justified only when the conflicting claims are for "the same debt or property."²⁰ It should not be granted in an action upon an award where the person sought to be substituted does not claim to be entitled to the award, but to the debt upon which it is predicated.²¹ If the plaintiff concedes that the third party is entitled to the property which is claimed by the third person, an order of interpleader will not be granted, but the plaintiff will be permitted to amend his complaint so as to exclude such property.²²

6. Interest of defendant in controversy.

As a general rule, an order of interpleader is granted only where the defendant is in the position of a stakeholder, and is indifferent as to which of the claimants will succeed.²³ If he disputes the plaintiff's claim in whole or in part, or if he has an interest in the controversy, a third party will not be substituted as a defendant.²⁴ Or, if the claim of the third party is in excess of that claimed by the plaintiff or admitted

19. *Butler v. Atlantic Trust Co.*, 28 Misc. 42, 59 N. Y. Supp. 814.

20. *Boskowitz v. Boskowitz*, 124 App. Div. 849, 109 N. Y. Supp. 490; *Heyman v. Smadbeck*, 6 Misc. 527, 58 St. Rep. 10, 27 N. Y. Supp. 141; *Freda v. Montauk Co.*, 26 Misc. 199, 55 N. Y. Supp. 748; *Cross & B. Co. v. Ludin Realty Co.*, 90 Misc. 606, 154 N. Y. Supp. 26; *New England Mut. Life Ins. Co. v. Keller*, 7 Civ. Proc. 109; *Chamberlain v. O'Connor*, 1 E. D. Smith 665, 8 How. Pr. 45; *DuBois v. Union Dime Savings Inst.*, 89 Hun 382, 69 St. Rep. 782, 25 Civ. Proc. 288, 2 Ann. Cas. 221, 35 N. Y. Supp. 397; *Applebaum v. Rosenblum*, 150 N. Y. Supp. 472.

21. *Heyman v. Smadbeck*, 6 Misc. 527, 58 St. Rep. 10, 27 N. Y. Supp. 141.

22. *Boskowitz v. Boskowitz*, 124 App. Div. 849, 109 N. Y. Supp. 490.

23. *Patterson v. Perry*, 14 How. Pr. 505.

24. *McHenry v. Hazard*, 45 N. Y. 580; *Dows v. Kidder*, 84 N. Y. 121; *Baltimore & Ohio R. Co. v. Arthur*, 90 N. Y. 234; *Chapman v. Forbes*, 123 N. Y. 542; *Burritt v. Press Publishing Co.*, 19 App. Div. 609, 49 N. Y. Supp. 295; *Bernstein v. Hamilton*, 26 App. Div. 206, 49 N. Y. Supp. 932; *Southwark National Bank v. Childs*, 39 App. Div. 560, 57 N. Y. Supp. 789; *Jackson v. Knickerbocker Athletic Club*, 49 App. Div. 107, 62 N. Y. Supp. 1109; *Mason v. Rice*, 85 App. Div. 315, 82 N. Y. Supp. 541; *Leiberman v. Manfred Amusement Co.*, 211 App. Div. 860, 206 N. Y. Supp. 875; *Cohen v.*

by the defendant, the order may be refused.²⁵ A plaintiff who claims interest in addition to principal, if his claim is not conceded by the defendant, cannot be required to litigate the issue with a third party.²⁶ A defendant who makes oath that he has a good defense upon the merits, has his remedy by answer rather than interpleader.²⁷

The statute, however, specifically provides the remedy of the defendant in a case where he disputes the claims of the parties or otherwise has an interest in the controversy. The third party is brought in as a co-defendant, and in this manner the entire controversy may be determined in the same action without placing the original defendant in jeopardy of a double liability.²⁸ While the effect of such an order is not to eliminate the original defendant as a party, the court may refer to the order as one of interpleader.²⁹ Or, if both claimants have commenced actions against the same defendant who disputes his liability, and in one of the actions both claimants are parties, but in the other only one claimant is a party, the latter action may be stayed until the determination of the former action in which all the matters in issue may be decided.³⁰

7. Discretion of court.

The granting of an order of interpleader is discretionary.³¹

Cohen, 35 Misc. 206, 71 N. Y. Supp. 481; Dodge v. Lawson, 22 Civ. Proc. 112, 19 N. Y. Supp. 904; Chamberlain v. O'Connor, 1 E. D. Smith 665, 8 How. Pr. 45; Brennon v. Liverpool, etc., Ins. Co., 12 Hun 62; Patterson v. Perry, 14 How. Pr. 505; Bender v. Sherwood, 15 How. Pr. 258.

25. DuBois v. Union Dime Savings Inst., 89 Hun 382, 69 St. Rep. 782, 25 Civ. Proc. 288, 2 Ann. Cas. 221, 35 N. Y. Supp. 397.

26. Sibley v. Equitable Life Assurance Co., 15 Civ. Proc. 316, 18 St. Rep. 834, 3 N. Y. Supp. 8, 56 Super. Ct. (24 J. & S.) 274.

27. Harvey v. Raynor, 32 Misc. 639, 66 N. Y. Supp. 490.

28. Mason v. Rice, 85 App. Div. 315, 62 N. Y. Supp. 541; Morgan v. Sagamore Development Co., 193 App. Div. 475, 184 N. Y. Supp. 311; Mitchell v.

Catlin & Powell Co., 71 Misc. 450, 128 N. Y. Supp. 692.

29. Morgan v. Sagamore Development Co., 193 App. Div. 475, 184 N. Y. Supp. 311.

30. Leiberman v. Manfred Amusement Co., 211 App. Div. 860, 206 N. Y. Supp. 875.

31. Steiner v. East River Sav. Inst., 60 App. Div. 232, 70 N. Y. Supp. 223, 32 Civ. Proc. 42; Williams v. Aetna Life Ins. Co., 8 St. Rep. 567.

Unnecessary interpleader.—The bringing in of possible or fancied claimants who have neither a lien nor a legal claim upon the fund is by no means a matter of discretion, for to unnecessarily interplead them is legal error. Cosgriff v. Hudson City Sav. Inst., 24 Misc. 4, 52 N. Y. Supp. 189, 27 Civ. Proc. 263.

This discretion is reviewable in the Appellate Division,³² but not in the Court of Appeals.³³ The vacating of an order of interpleader is equally a matter of discretion.³⁴ This discretion will not be exercised in favor of the defendant unless he shows that the alleged claim of the proposed defendant is of a substantial nature.³⁵ The insolvency of the third person is a matter which the court can properly consider as bearing its discretion, but such fact does not require the denial of the application.³⁶ Nor is the order necessarily denied because, on account of the death of a claimant, the plaintiff would be unable to testify as to personal transactions with the deceased, and he would not be incompetent to so testify if the action continued against the original defendant.³⁷

8. Collusion.

By the express language of the statute, an order of interpleader is not to be granted unless the claim of the third party is made without collusion with the defendant.³⁸ A defendant, after incurring an obligation to a plaintiff, cannot seek a third person to make a claim for the subject matter and thus present grounds for relief from the litigation. Collusion, however, is a defense to the application only when the defendant is a party thereto.³⁹

32. *Burritt v. Press Publishing Co.*, 25 App. Div. 141, 49 N. Y. Supp. 201; *Wilson v. Duncan*, 11 Abb. Pr. 3.

33. *Barry v. Mutual L. Ins. Co.*, 53 N. Y. 536; *Tauton v. Groh*, 4 Abb. Dec. 358, 8 Abb. Pr. N. S. 385, 39 How. Pr. 147.

34. *Barry v. Mutual L. Ins. Co.*, 53 N. Y. 536.

35. *Wells v. National City Bank*, 40 App. Div. 498, 58 N. Y. Supp. 125, 29 Civ. Proc. R. 158; *Mitchell v. Catlin & Powell Co.*, 71 Misc. 450, 128 N. Y. Supp. 692. "The court when called upon to exercise its discretion should be able to see that there is some foundation for the claim of a third party, and that it is not merely capricious or arbitrary or fanciful; and in order that this may be done, it is

the duty of a person asserting the claim to show that he has some ground upon which he may reasonably assert the claim, or base a supposition that he is entitled to what he demands." *Steiner v. East River Sav. Inst.*, 60 App. Div. 232, 70 N. Y. Supp. 223, 32 Civ. Proc. 42.

36. *Burritt v. Press Publishing Co.*, 25 App. Div. 141, 49 N. Y. Supp. 201.

37. *Flanery v. Emigrant Industrial Savings Bank*, 23 Abb. N. C. 40, 7 N. Y. Supp. 2.

38. *Boskowitz v. Boskowitz*, 124 App. Div. 849, 109 N. Y. Supp. 490; *O'Connor v. Lock*, 148 App. Div. 765, 133 N. Y. Supp. 320.

39. *Wehle v. Bowery Savings Bank*, 40 Super. Ct. (8 J. & S.) 87.

9. Debtor.

One conceding that he owes a certain debt may have an order of interpleader when he is sued therefor by one person and a third person has presented a substantial claim to the obligation.⁴⁰ Thus, in an action on a promissory note, if a third person claims to be the owner of the instrument, and there are reasonable grounds for his claim, the latter may be impleaded.⁴¹ Or, in an action to foreclose a mortgage, the mortgagor may pay the mortgage debt into court and have an order of interpleader against a third person claiming title to the mortgage.⁴² If there has arisen reasonable doubt as to who is entitled to the rents of leased premises, the tenant may interplead the claimants of the reality.⁴³ A purchaser of merchandise when sued for the purchase price, may, in a proper case, substitute a third person who claims to be entitled to the proceeds.⁴⁴ Rival claimants to coupons attached to corporate bonds may, upon the motion

40. *American Trust & Savings Bank v. Thalheimer*, 29 App. Div. 170, 51 N. Y. Supp. 813; *Siegel v. Goldstone*, 75 Misc. 469, 133 N. Y. Supp. 453; *Drake v. Woodford*, 33 St. Rep. 994, 11 N. Y. Supp. 512; *Jarvis v. Benedict*, 37 St. Rep. 588, 20 Civ. Proc. R. 266, 14 N. Y. Supp. 178.

Partnership.—Where, in an action by the assignee of one partner to recover a debt due to the firm, the other partner notifies the defendant not to pay the debt except to him and makes demand therefor, the defendant is entitled to an order of interpleader making the plaintiff's assignor a party defendant. *Siegel v. Goldstone*, 75 Misc. 469, 133 N. Y. Supp. 453.

Claim against estate.—An interpleader will not be granted to bring in general creditors on motion of executors in an action brought against them to establish a claim against the estate where the general creditors notify the executors that they dispute the claim, since neither the estate nor the executors are liable to any hazard, damage or loss if the action is prosecuted in good faith and without negli-

gence. *Denniston v. Snyder*, 98 Misc. 44, 162 N. Y. Supp. 271.

Attachment.—In an action by the assignee of a claim for goods sold, it is proper to substitute as defendant in place of the debtor, an officer who has attached the claim on behalf of creditors of the assignor where there is no collusion between the officer and the debtors. *Simons v. Hearn*, 44 St. Rep. 767, 17 N. Y. Supp. 847.

41. *Johnson v. Lewis*, 4 Abb. Pr. N. S. 150; *Howe Machine Co. v. Gifford*, 66 Barb. 597; *Van Buskirk v. Roy*, 8 How. Pr. 425.

42. *Tauton v. Groh*, 4 Abb. Dec. 358, 8 Abb. Pr. N. S. 385, 39 How. Pr. 147; *VanLoan v. Squires*, 23 Abb. N. C. 230, 7 N. Y. Supp. 171.

43. *Schell v. Lowe*, 75 Hun 43, 58 St. Rep. 179, 23 Civ. Proc. R. 300, 26 N. Y. Supp. 991.

44. *Reichardt v. American Platinum Works*, 47 Misc. 650, 94 N. Y. Supp. 384; *Johnson v. Lewis*, 4 Abb. Pr. N. S. 150; *Tynan v. Cadenas*, 3 How. Pr. N. S. 78; *SanFernando Heights Lemon Co. v. Fruit Auction Co.*, 174 N. Y. Supp. 156.

of the corporation, be impleaded.⁴⁵ In an action against a city to recover an award made in a street opening case, a third party claiming the award may be substituted as a defendant.⁴⁶

10. Bailee.

A bailee on whom conflicting claims are made for the possession of the subject of the bailment, may have an order of interpleader,⁴⁷ though the order may well be refused in those cases where the action is by the bailor and the circumstances deny the bailee the right to dispute the bailor's title.⁴⁸ As to warehousemen, the right of interpleader under section 287 of the Civil Practice Act is reinforced by section 103 of the General Business Law.⁴⁹ A common carrier may, in a proper case, when he is sued for goods, have an order substituting another claimant as defendant.⁵⁰

11. Bank.

If moneys on deposit in a bank are claimed by two or more persons, an order of interpleader may be granted in an action by one claimant so as to substitute other claim-

45. *Hirsch v. Military-Naval Corp.*, 138 N. Y. Supp. 1076.

46. *Barnes v. Mayor, etc.*, of New York, 27 Hun 236; *Pollock v. Morris*, 51 Super. Ct. (19 J. & S.) 112, affirmed, 105 N. Y. 676.

47. *McKay v. Draper*, 27 N. Y. 256; *Follett Wool Co. v. Albany Terminal Warehouse Co.*, 61 App. Div. 296, 70 N. Y. Supp. 474; *Friedman v. Platt*, 21 St. Rep. 190, 4 N. Y. Supp. 125.

48. *Vosburgh v. Huntington*, 15 Abb. Pr. 254.

49. *Follett Wool Co. v. Albany Terminal Warehouse Co.*, 61 App. Div. 296, 70 N. Y. Supp. 474; *Hoffman House v. Manhattan Storage & Warehouse Co.*, 74 App. Div. 476, 77 N. Y. Supp. 435; *Greenberger v. North Side Storage Warehouse Co.*, 170 App. Div. 887, 154 N. Y. Supp. 450; *Rosenberg v. P. Viane*, 109 Misc. 215, 179 N. Y. Supp. 447. See also, *Brown Shoe Co. v. Vandam Warehouse Co.*, 186 App. Div. 718, 175 N. Y. Supp. 68.

When interpleader denied.—An interpleader is not to be granted, on the application of a warehouse company in an action brought against it to recover the possession of goods claimed by it to be held as bailee, subject to a lien for storage, when it appears that the defendant does not propose to deliver the entire property to the party sought to be interpleaded as the holder of the warehouse receipt (which covers the goods sued for, together with many others), and the defendant's lien for storage is disputed by such party, and it appears that the defendant does not stand indifferent between the parties, because of the claims of various parties arising out of the manner in which it has dealt with the goods and its manner of issuing warehouse receipts. *Lawson v. Terminal Warehouse Co.*, 70 Hun 281, 24 N. Y. Supp. 281.

50. *Schuyler v. Hargous*, 26 Super. Ct. (3 Rob.) 673, 28 How. Pr. 245.

ants as defendants.⁵¹ In addition to the general provisions of the Civil Practice Act, the Banking Law contains special provisions for such remedy when an action is brought against a state bank.⁵² In similar language special provision is also made for the protection of trust companies.⁵³ Savings banks also receive the benefit of a similar enactment.⁵⁴ These statutes provide a remedy in addition to and not exclusive of that allowed by section 287 of the Civil Practice Act.⁵⁵

One additional feature of the remedy under the Banking Law is that the order may be made without proof of the merits of the claim of the person desired to be impleaded.⁵⁶ This, however, does not necessarily dispense with the discretion of the court;⁵⁷ and, if it clearly appears that the claim of a third person is without substance, the order should be withheld.⁵⁸

51. *Schweiger v. German Savings Bank*, 27 Misc. 123, 57 N. Y. Supp. 356; *Wells v. Corn Exch. Bk.*, 43 Misc. 377, 87 N. Y. Supp. 480; *Pratt v. Myers*, 28 Abb. N. C. 460, 45 St. Rep. 63, 18 N. Y. Supp. 466; *Fletcher v. Troy Sav. Bank*, 14 How. Pr. 383; *Smith v. Emigrant Industrial Savings Bank*, 2 N. Y. Supp. 617, 17 St. Rep. 852; *Norton v. Union Trust Co.*, 27 Week. Dig. 22, 9 St. Rep. 845.

52. See Banking Law, § 113.

53. Banking Law, § 199. And see, *Hanna v. Manufacturers' Trust Co.*, 104 App. Div. 90, 93 N. Y. Supp. 304; *Evans v. Guaranty Trust Co.*, 187 App. Div. 30, 175 N. Y. Supp. 118.

54. Banking Law, § 250. And see, *McGuire v. Auburn Sav. Bk.*, 78 App. Div. 22, 79 N. Y. Supp. 91; *Hemmerich v. Union Dime Savings Inst.*, 144 App. Div. 413, 129 N. Y. Supp. 267, affirmed, 205 N. Y. 366; *Gorrschall v. German Sav. Bk.*, 45 Misc. 27, 90 N. Y. Supp. 896; *Progressive Handlanger Union v. German Savings Bank*, 23 Abb. N. C. 42, 57 Super. Ct. (25 J. & S.) 594, 29 St. Rep. 528, 8 N. Y. Supp. 545; *Mars v. Albany Savings Bank*, 64 Hun 424, 26 St. Rep. 464, 19 N. Y. Supp. 791; *Dubois v. Union*

Dime Savings Inst., 89 Hun 382, 69 St. Rep. 782, 25 Civ. Proc. 288, 2 Ann. Cas. 221, 35 N. Y. Supp. 397; *Quinn v. Bank for Savings*, 86 N. Y. Supp. 285.

Future interests.—Where, under the will of a testator the interest of his children in the funds of the estate is purely a future interest which gives to them no present right to the possession of the funds of the estate; such a future interest is not such a claim as is contemplated by the Banking Law, and that consequently the order granting the bank's application for interpleader is unauthorized. *Gifford v. Oneida Savings Bank*, 99 App. Div. 25, 90 N. Y. Supp. 693.

55. *Evans v. Guaranty Trust Co.*, 187 App. Div. 30, 175 N. Y. Supp. 118.

56. *Mahro v. Greenwich Sav. Bank*, 16 Misc. 537, 40 N. Y. Supp. 29.

57. *Steiner v. East River Sav. Inst.*, 60 App. Div. 232, 70 N. Y. Supp. 223, 32 Civ. Proc. 42; *McGuire v. Auburn Sav. Bk.*, 78 App. Div. 22, 79 N. Y. Supp. 91.

58. *Greenwald v. State Bank*, 124 Misc. 176, 207 N. Y. Supp. 214, affirmed without opinion, 213 App. Div. 810, 208 N. Y. Supp. 870.

Another feature which is peculiar to the Banking Law, is that the moneys may remain in the possession of the bank,⁵⁹ or the court may order the deposit paid into court. The court may order the surrender of the pass-book to the bank.⁶⁰

12. Insurance company.

An insurance company is entitled to an order of interpleader when conflicting claims are made to the proceeds of a life insurance policy issued by it, and there is reasonable doubt as to which claimant is in the right.⁶¹ The same situation may exist as to a benefit certificate issued by a fraternal organization.⁶² An order may be granted where there is a controversy as to interests in real property and hence a doubt as to who is entitled to receive the proceeds from a fire insurance policy.⁶³ The company, however, is bound to show that the claim of the third party proposed to be impleaded is of such a substantial nature that it is in danger of a double liability.⁶⁴ The fact that the company may have a technical defense as to one of the claimants does not require a denial of the application, for it may waive the defense.⁶⁵ But an order discharging the company will not be granted if the

59. See also, *McKeown v. Bank for Savings*, 26 Misc. 824, 56 N. Y. Supp. 1080.

60. *Quinn v. Bank for Savings*, 86 N. Y. Supp. 285.

61. *Woolworth v. Phoenix Mut. Life Ins. Co.*, 25 App. Div. 629, 49 N. Y. Supp. 512; *Merchant v. Northwestern Mut. Life Ins. Co.*, 57 App. Div. 375, 68 N. Y. Supp. 406; *McCabe v. McCabe*, 67 App. Div. 589, 73 N. Y. Supp. 852, 32 N. Y. Civ. Proc. Rep. 320; *Koenig v. N. Y. Life Ins. Co.*, 14 Civ. Proc. R. 269, 14 St. Rep. 250; *Singer v. New York L. Ins. Co.*, 160 N. Y. Supp. 442; *Pierce v. Mutual L. Ins. Co.*, 190 N. Y. Supp. 50. See also, *Lane v. N. Y. Life Ins. Co.*, 56 Hun 92, 29 St. Rep. 952, 9 N. Y. Supp. 52.

62. *McCormick v. Supreme Council C. B. L.*, 6 App. Div. 175, 39 N. Y. Supp. 1010; *Natowitz v. Independent Order, etc.*, 149 App. Div. 607, 133 N. Y. Supp. 1065; *Callahan v. Supreme Tent Knights of the Maccabees, etc.*,

121 N. Y. Supp. 354; *Lokchinsky v. Independent Order Brith Abraham, etc.*, 131 N. Y. Supp. 577.

63. *Sexton v. Home Fire Ins. Co.*, 35 App. Div. 170, 54 N. Y. Supp. 862; *Grell v. Globe & Rutgers Fire Ins. Co.*, 55 App. Div. 612, 67 N. Y. Supp. 253.

64. *Wertheimer v. Independent Order Free Sons of Judah*, 28 App. Div. 64, 50 N. Y. Supp. 842; *Lateer v. Prudential Ins. Co.*, 64 App. Div. 423, 72 N. Y. Supp. 235; *Kirsop v. Mut. Life Ins. Co.*, 87 App. Div. 170, 84 N. Y. Supp. 95, appeal dismissed, 178 N. Y. 603; *McNamara v. Knights of Columbus*, 206 App. Div. 364, 201 N. Y. Supp. 235; *Lennon v. Metropolitan Life Ins. Co.*, 20 Misc. 403, 79 St. Rep. 1033, 45 N. Y. Supp. 1033; *Fowler v. Harvey G. Eastman Council*, 58 Misc. 14, 108 N. Y. Supp. 1017.

65. *Grell v. Globe & Rutgers Fire Ins. Co.*, 55 App. Div. 612, 67 N. Y. Supp. 253.

company disputes its liability, either in whole or in part.⁶⁶ A controversy as to whether the company should pay interest may preclude its elimination from the action, though the adverse claimant may be brought in as an additional party.⁶⁷

13. Claimants of brokerage commissions.

Two or more real estate brokers may claim to have earned the commission for effecting a sale of a certain premises. If the owner is liable to pay but one commission, and there is reasonable doubt as to who should receive it, an order of interpleader may be granted.⁶⁸ The owner should negative the possible conclusion that he has become responsible for the payment of two commissions.⁶⁹ The order will not be granted unless it appears that the brokers are claiming the same debt.⁷⁰ Moreover, the owner must show that there is reasonable basis for the claim of the third party sought to be impleaded.⁷¹ The possibility that the owner may have rendered himself liable for two commissions causes the courts to be careful in impleading rival brokers, and hence the order is frequently denied as a matter of discretion. An appellate court will not interfere with such an exercise of discretion.⁷²

14. Action of replevin.

Section 287 of the Civil Practice Act expressly authorizes the interpleader of an adverse claimant in an action of

66. *Brennon v. Liverpool, etc., Ins. Co.*, 12 Hun 62. See also, *Fanning v. Supreme Council, Catholic Mut. Ben. Assn.*, 61 App. Div. 190, 70 N. Y. Supp. 436.

67. *Sibley v. Equitable Life Assurance Co.*, 15 Civ. Proc. R. 316, 13 St. Rep. 834, 3 N. Y. Supp. 8, 56 Super. Ct. (24 J. & S.) 274.

68. *Rasines v. Ives*, 85 App. Div. 483, 83 N. Y. Supp. 228; *Trembley v. Marshall*, 118 App. Div. 839, 103 N. Y. Supp. 680; *Myers v. Batcheller*, 177 App. Div. 47, 163 N. Y. Supp. 688; *Stinson v. 6-8 West 57th Street Corp.*, 127 Misc. 69, 215 N. Y. Supp. 252; *Rogers v. Picken Realty Co.*, 55 Misc. 199, 105 N. Y. Supp. 281; *Fox v. Cammeyer*, 93 Misc. 180, 156 N. Y.

Supp. 1046; *Shipman v. Scott*, 12 Civ. Proc. R. (Browne) 109, 14 Daly 233, 6 St. Rep. 284; *Dreyer v. Rauch*, 10 Abb. Pr. N. S. 343, 42 How. Pr. 22, 3 Daly 434.

69. *Olsen v. Moran*, 50 Misc. 655, 99 N. Y. Supp. 333. See also, *Cross & B. Co. v. Ludin Realty Co.*, 90 Misc. 606, 154 N. Y. Supp. 25.

70. *Taylor v. Satterthwaite*, 2 Misc. 441, 51 St. Rep. 565, 22 N. Y. Supp. 187.

71. *Chamberlain v. Almy*, 3 Misc. 555, 52 St. Rep. 522, 23 N. Y. Supp. 316; *Cohen v. Cohen*, 35 Misc. 206, 71 N. Y. Supp. 481.

72. *Carroll v. Demarest*, 42 App. Div. 155, 58 N. Y. Supp. 1028.

replevin.⁷³ Sections 1107 *et seq.* of the Civil Practice Act also contain practice provisions where a third person makes a claim to property which has been replevined. If the defendant makes no claim to the property, the adverse claimant may be impleaded as a defendant, but the statutes govern the possession of the chattels, and the court will make no direction as to the disposition of the property pending the action.⁷⁴

D. Power of local and inferior courts.

The effect of an order of interpleader is to convert the action into an equitable suit between the claimants.⁷⁵ The question has, therefore, been raised whether an order of interpleader can be granted by a court which has no equitable jurisdiction. The order cannot be granted in an action commenced in a justice's court, although it has been transferred to a county court on a plea of title to real estate.⁷⁶

The City Court of New York, although it does not have general equitable jurisdiction, may grant an order of interpleader in an action at law, and may thereafter determine the controversy between the claimants.⁷⁷ To this extent, the court has equitable jurisdiction.⁷⁸ It cannot, however, award the broad equitable relief which might be granted in a suit in Supreme Court, such as the rescission of a written instrument.⁷⁹ If the effect of the order would be to convert

73. See *Drayfus v. Casey*, 23 St. Rep. 397, 52 Hun 95, 5 N. Y. Supp. 605.

74. *Wright Steam Engine Works v. N. Y. Kerosene Oil Engine Co.*, 44 Misc. 580, 90 N. Y. Supp. 130. See also, *Pelham Hod Elevating Co. v. Baggaley*, 34 St. Rep. 691, 12 N. Y. Supp. 218.

75. See, *infra*, II-E-5, Effect of order.

76. *Rundle v. Gordon*, 27 App. Div. 452, 50 N. Y. Supp. 353.

77. *Krugman v. Hanover Fire Ins. Co.*, 45 Misc. 346, 90 N. Y. Supp. 448; *U. S. Mortgage & Trust Co. v. Vermilye & Power*, 72 Misc. 375, 130 N. Y. Supp. 303; *Smith v. Emigrant Industrial Savings Bank*, 2 N. Y. Supp. 617, 17 St. Rep. 852. See also, *Wells*

v. Corn Exch. Bk., 43 Misc. 377, 87 N. Y. Supp. 480; *Gorrschall v. German Sav. Bk.*, 45 Misc. 27, 90 N. Y. Supp. 896.

Calendar practice.—Rule XIV of the rules of the City Court prescribes the practice. See *Schreiber v. Dry Dock Sav. Inst.*, 59 Misc. 408, 112 N. Y. Supp. 360.

78. *Krugman v. Hanover Fire Ins. Co.*, 45 Misc. 346, 90 N. Y. Supp. 448; *Smith v. Emigrant Industrial Savings Bank*, 2 N. Y. Supp. 617, 17 St. Rep. 852.

79. *Edwards v. Greenwich Savings Bk.*, 59 Misc. 451, 110 N. Y. Supp. 920. See also, *Harvey v. Raynor*, 32 Misc. 639, 66 N. Y. Supp. 490.

the action into one of which it has no jurisdiction, the order should not be granted.⁸⁰

The Municipal Court of the City of New York is by section 27 of the Municipal Court Code expressly given the power to make an order of interpleader.⁸¹ It may substitute a third person as defendant in place of the original defendant and direct the payment of the debt or property into court.⁸² This power is given only in an action to recover upon a contract or to recover a chattel.⁸³ It cannot make an order which would have the effect of increasing its jurisdiction beyond the \$1,000 limit.⁸⁴

E. Procedure.

1. Affidavit for order.

While the statute does not prescribe the contents of the moving papers for an order of interpleader, the necessary allegations are well established. The defendant's affidavit should aver the commencement of action against him, the nature of the action, and the fact that no answer has been served. It must allege that a third person has preferred a claim against him for the same debt or property referred to in the complaint, and must state sufficient facts so that the court can determine that there is such a reasonable basis for the claim that the defendant permit judgment in favor of the plaintiff without hazard to further liability to

⁸⁰. *Marcus v. Aufses*, 94 N. Y. Supp. 397.

⁸¹. *Englander v. Fleck*, 51 Misc. 567, 101 N. Y. Supp. 125; *Rogers v. Picken Realty Co.*, 55 Misc. 199, 105 N. Y. Supp. 281. See also, *Jacobs v. Leiberman*, 51 App. Div. 542, 64 N. Y. Supp. 953; *Dreyer v. Rauch*, 10 Abb. Pr. N. S. 343, 42 How. Pr. 22, 3 Daly 434; *McElroy v. Baer*, 3 How. Pr. N. S. 340, 9 Civ. Proc. R. 133.

⁸². *Rogers v. Picken Realty Co.*, 55 Misc. 199, 105 N. Y. Supp. 281; *Barnett v. Typermass & Co.*, 133 N. Y. Supp. 454.

⁸³. *Wiebalk v. New York*, 146 App. Div. 925, 131 N. Y. Supp. 1150; *Midler v. Lese*, 45 Misc. 637, 91 N. Y. Supp.

148; *Oppenheim v. Levine*, 93 Misc. 47, 156 N. Y. Supp. 599.

Conversion.—The Municipal Court of the city of New York has no jurisdiction to grant an order of interpleader in an action for conversion; but if such an order is granted plaintiff's only remedy is to comply therewith, go to trial, and have the order reviewed on the hearing of an appeal from the judgment in favor of defendant. *Oppenheim v. Levine*, 93 Misc. 47, 156 N. Y. Supp. 599.

Summary proceedings.—Interpleader not permitted. *Erking v. Tucker*, 62 Misc. 495, 115 N. Y. Supp. 256.

⁸⁴. *Basile v. Basile*, 120 Misc. 63, 197 N. Y. Supp. 668.

such third person.⁸⁵ Ordinarily it should also state that the defendant claims no beneficial interest in the matter in controversy, and that there is an absence of collusion between him and either of the claimants.⁸⁶ It should also contain an offer to pay the debt into court or to deliver the property in controversy as he may be directed by the court.⁸⁷ No less proof is required to entitle a defendant to an order of interpleader than is necessary to support an action of interpleader.⁸⁸ The affidavit need not contain a formal statement that the defendant is in doubt as to which party is in the right, if the facts stated indicate the existence of such a doubt.⁸⁹

2. Notice of application for order.

Notice of the application of the defendant for an order of interpleader must be given to the attorney for the plaintiff according to the usual practice. If the third party sought to be impleaded has not commenced an action against the defendant, the notice of application must be served upon him personally.⁹⁰ The notice of application, so far as the third party is concerned, has substantially the effect of a summons and is served in the same manner.⁹¹ Jurisdiction cannot be acquired on a non-resident by service of the notice on him outside of the State, either personally or by substitution.⁹²

85. *Pouch v. Prudential Ins. Co.*, 204 N. Y. 281; *Burritt v. Press Publishing Co.*, 19 App. Div. 609, 49 N. Y. Supp. 295; *Roberts v. VanHorne*, 21 App. Div. 369, 47 N. Y. Supp. 443; *Wells v. National City Bank*, 40 App. Div. 498, 58 N. Y. Supp. 125, 29 Civ. Proc. R. 158; *Helene v. Corn Exch. Bk.*, 96 App. Div. 392, 89 N. Y. Supp. 310; *Schell v. Lowe*, 75 Hun 43, 58 St. Rep. 179, 23 Civ. Proc. 300, 26 N. Y. Supp. 991; *Cohen v. Cohen*, 35 Misc. 206, 71 N. Y. Supp. 481.

86. *Helene v. Corn Exch. Bank*, 96 App. Div. 392, 89 N. Y. Supp. 310; *O'Connor v. Lock*, 148 App. Div. 765, 133 N. Y. Supp. 320.

87. *Schell v. Lowe*, 75 Hun 43, 58 St. Rep. 179, 23 Civ. Proc. R. 300, 26 N. Y. Supp. 991.

88. *Wells v. National City Bank*, 40

App. Div. 498, 58 N. Y. Supp. 125, 29 Civ. Proc. 158.

89. *Schell v. Lowe*, 75 Hun 43, 58 St. Rep. 179, 23 Civ. Proc. 300, 26 N. Y. Supp. 991.

90. *Roberts v. VanHorne*, 21 App. Div. 369, 47 N. Y. Supp. 443; *Bullowa v. Provident Life & Trust Co.*, 125 App. Div. 545, 109 N. Y. Supp. 1058; *O'Connor v. Lock*, 148 App. Div. 765, 133 N. Y. Supp. 320; *Rosenthal v. United Transp. Co.*, 196 App. Div. 540, 188 N. Y. Supp. 154; *Vyne v. Mosson*, 92 Misc. 447, 156 N. Y. Supp. 274; *Feldman v. Grand Lodge of the Order of United Workmen*, 46 St. Rep. 122, 22 Civ. Proc. R. 165, 19 N. Y. Supp. 73.

91. *DeVoy v. Nelles*, 197 App. Div. 628, 189 N. Y. Supp. 492.

92. *Bullowa v. Provident Life &*

3. Delay in making application.

According to the terms of the statute, the application for an order of interpleader may be made at any time before answer.⁹³ A delayed application may be denied,⁹⁴ but an unverified answer which is returned does not defeat the motion.⁹⁵ An extension of time may be secured under section 98 of the Civil Practice Act.⁹⁶ It has been said that the interposition of an answer in order to escape a default does not preclude the order,⁹⁷ but safe practice requires an order of extension, or a show cause order staying proceedings until the determination of the application.

4. The order.

If the defendant is successful in his application, the order provides for the substitution of the adverse claimant in the place of defendant; makes directions as to the deposit of the debt or property in controversy, and provides that upon such deposit, the original defendant shall be discharged from liability therefor to either of the parties.⁹⁸ The defendant should not be discharged unless the order provides for the deposit of all that the plaintiff claims,⁹⁹ including interest.¹ If both claimants have commenced actions, proceedings in one should be stayed, while the interpleader is granted in the other.²

Trust Co., 125 App. Div. 545, 109 N. Y. Supp. 1058; *Devoy v. Nelles*, 197 App. Div. 628, 189 N. Y. Supp. 492.

93. *Patterson v. Perry*, 14 How. Pr. 505.

94. *Martin v. Barker*, 125 Misc. 486, 211 N. Y. Supp. 696; *U. S. Land & Investment Co. v. Bussey*, 27 St. Rep. 185, 7 N. Y. Supp. 495.

95. *Howe Machine Co. v. Gifford*, 66 Barb. 597.

96. See *Sophian v. Fidelity & D. Co.*, 184 App. Div. 553, 172 N. Y. Supp. 392.

97. *Quinn v. Bank for Savings*, 86 N. Y. Supp. 285.

98. *O'Connor v. Lock*, 148 App. Div. 765, 133 N. Y. Supp. 320.

99. *Mason v. Rice*, 85 App. Div. 315, 82 N. Y. Supp. 541.

1. *Helene v. Corn Exch. Bank*, 96

App. Div. 392, 89 N. Y. Supp. 310; *Sibley v. Equitable Life Assur. Co.*, 15 Civ. Proc. 316, 18 St. Rep. 834, 3 N. Y. Supp. 8, 56 Super. Ct. (24 J. & S.) 274; *Feldman v. Grand Lodge of United Workmen*, 46 St. Rep. 122, 22 Civ. Proc. 165, 19 N. Y. Supp. 73.

2. *Helene v. Corn Exch. Bk.*, 96 App. Div. 392, 89 N. Y. Supp. 310.

Substitution in action first brought.

—Where an action upon contract is brought by a sheriff, and thereafter an action is brought by a receiver to recover the same money from the same defendants, and the latter apply for an order of interpleader, the order should provide for bringing the receiver into the sheriff's suit, and not the sheriff into the receiver's suit. *Sickles v. Wilmerding*, 59 Hun 375, 36 St. Rep. 562, 13 N. Y. Supp. 43.

The order should not direct the plaintiff to serve an amended or supplemental complaint,³ but gives him that privilege if he be so advised, and requires the impleaded defendant to answer thereto or to the original complaint, or to make such motion as he may be advised, under penalty, should he fail to come in and plead, of an adjudication against him.⁴ If the order does not permit the service of a supplemental complaint, the plaintiff must move under section 245 of the Civil Practice Act for permission to serve one.⁵ The original complaint does not state a cause of action as against the substituted defendant.⁶ A supplemental complaint should not only allege the substitution of the new defendant, the dismissal of the original defendant and the deposit of the amount claimed, but such other appropriate allegations in relation to the new defendant as the plaintiff will be required to prove to maintain his action, as, for example, that the substituted defendant makes a claim for the money deposited, and that a cause of action exists in favor of the plaintiff against the substituted defendant. Where the pleading served after the making of an order of interpleader is declared by its terms to be not only a supplemental, but an amended complaint, it is to be construed as a substitute for the original complaint, and the substituted defendant is entitled to attack it on motion.⁷ Within the time prescribed by law, the substituted defendant must interpose an answer to the supplemental complaint, or make such motion thereon as is advisable.⁸

5. Effect of order.

The original defendant is not required to accept the benefits of the order, but instead of taking advantage of it, he may answer the plaintiff's complaint.⁹ If the defendant accepts the order and makes the deposit, the order has the effect of changing the nature of the action from one at law

3. *Eastern Optical Co. v. General Optical Co.*, 219 App. Div. 294, 219 N. Y. Supp. 692.

4. *Eastern Optical Co. v. General Optical Co.*, 219 App. Div. 294, 219 N. Y. Supp. 692.

5. *Greenblatt v. Mendelsohn*, 46 Misc. 554, 92 N. Y. Supp. 963; *Wilson v. Lawrence*, 8 Hun 593.

6. *Wilson v. Lawrence*, 8 Hun 593.

7. *Sayer v. Beirne*, 78 App. Div. 491, 79 N. Y. Supp. 696.

8. *Greenblatt v. Mendelsohn*, 46 Misc. 554, 92 N. Y. Supp. 963.

9. *Neill v. Wuest*, 17 Abb. Pr. 319, note.

to one in equity.¹⁰ The issues are triable by the court, and neither party is entitled, as of right, to a jury trial.¹¹

The third party who is brought in cannot be required to furnish security for costs, even though he be a nonresident and irresponsible.¹²

One who consents to an order of interpleader against him, answers the complaint and submits to the jurisdiction of the court, cannot afterwards complain that the court did not have jurisdiction to render judgment against him.¹³ One who assists in procuring an order of interpleader and consents that upon payment into court of the fund in controversy he be substituted as defendant cannot raise the question whether the original defendant could have maintained an action of strict interpleader.¹⁴

6. Judgment.

If the defendant fails to answer the plaintiff's supplemental complaint, judgment by default may be rendered against him.¹⁵ If issue is joined, the rights of the parties to the deposit made by the original defendant are determined, and the depository is directed to deliver the same to the successful party.¹⁶ The court may apportion the fund according to the equitable rights of the parties, and may fasten upon the fund, in whole or in part, any equitable lien or trust which one of the parties may have established, although the proprietary legal title is in the other.¹⁷ Where the impleaded defendant claims but a part of the fund, the court may, in advance of the trial of the issues, direct payment of the uncontested amount to the plaintiff.¹⁸

10. *Clark v. Mosher*, 107 N. Y. 118; *Windecker v. Mutual Life Ins. Co.*, 12 App. Div. 73, 43 N. Y. Supp. 358; *Greenblatt v. Mendelsohn*, 46 Misc. 554, 92 N. Y. Supp. 963; *Smith v. Emigrant Industrial Savings Bank*, 2 N. Y. Supp. 617, 17 St. Rep. 852; *White v. White*, 194 N. Y. Supp. 114.

11. *Clark v. Mosher*, 107 N. Y. 118; *Smith v. Emigrant Industrial Savings Bank*, 2 N. Y. Supp. 617, 17 St. Rep. 852.

12. *McHugh v. Astrophe*, 1 Misc. 218, 20 N. Y. Supp. 877, reversed on other grounds, 2 Misc. 478, 22 N. Y. Supp. 79.

13. *Jacobs v. Leiberma*n, 51 App. Div. 542, 64 N. Y. Supp. 953.

14. *Hirsch v. Mayer*, 165 N. Y. 236, affirming, 31 App. Div. 627, 54 N. Y. Supp. 1075.

15. *Cross & B. Co. v. Ludin Realty Co.*, 90 Misc. 606, 154 N. Y. Supp. 25.

16. *McElroy v. Baer*, 3 How. Pr. N. S. 340, 9 Civ. Proc. R. (Browne) 133.

17. *Wilnecker v. Mut. Life Ins. Co.*, 12 App. Div. 73, 43 N. Y. Supp. 358.

18. *Koenig v. N. Y. Life Ins. Co.*, 14 Civ. Proc. R. 269, 14 St. Rep. 250; *Feldman v. Grand Lodge of United Workmen*, 46 St. Rep. 122, 22 Civ. Proc. R. 165, 19 N. Y. Supp. 73.

7. Costs.

It has been held that the original defendant is not entitled to costs on the application for the order of interpleader, either costs of the action,¹⁹ or motion costs.²⁰ As between the plaintiff and an impleaded defendant, costs are discretionary as in other equitable actions.²¹

8. Form of order of interpleader.²²

(Caption and title.)

On reading and filing the affidavit of Aaron C. Goodman, sworn the 14th day of February, 1885, and the stipulation between the plaintiff above-named and Charles Mosher, dated February 19th, 1885, and the written consent, etc., of attorneys for the respective parties and the claimant, and upon proof of due service of notice of this motion for 21st inst., and the motion having been held open.

It is now upon motion of Norton Chase, of counsel for the defendants, no one appearing in opposition,

Ordered, That on the depositing by the defendants in the Union National Bank of Troy, N. Y., on the amount claimed in the complaint herein, less \$50, their costs in this action, as fixed and allowed by the written stipulation of attorneys for parties and claimant, within ten days from the entry of this order, Charles A. Mosher be substituted as defendant herein in place of The Phoenix Mutual Life Insurance Company of Hartford, Conn., the defendant above-named, and that the said The Phoenix Mutual Life Insurance Company of Hartford, Conn., thereupon be discharged from liability to either the plaintiff above-named or said Charles A. Mosher.

And it is further ordered, That if the said Charles A. Mosher does not appear and defend this action within twenty days after service upon him of a copy of this order, together with a copy of the complaint herein, the plaintiff may apply *ex parte* for an order that the money so deposited be paid over to her.

9. Another form of order.²³

(Caption and title.)

A motion having been brought on for hearing by the defendant, the Provident Savings Life Assurance Society of New York, before this court, on Friday, the 29th day of March, 1895, for an order substituting David Mayer as defendant in the above entitled action in the place and stead of the Provident Savings Life Assurance

19. Lane v. Equitable L. Assur. Soc., 12 App. Div. 73, 43 N. Y. Supp. 358. 102 App. Div. 470, 92 N. Y. Supp. 877. 22. This form is adapted from that But see, Bowery Sav. Bank v. Mahler, used in Clark v. Mosher, 107 N. Y. 45 Super. Ct. (13 J. & S.) 619. 118.

20. Scharff v. Supreme Lodge K. H., 23. This form is adapted from that 96 App. Div. 632, 89 N. Y. Supp. 168. used in Hirsch v. Mayer, 165 N. Y.

21. Windecker v. Mut. Life Ins. Co., 236.

Society of New York and discharging the Provident Savings Life Assurance Society of New York, the defendant herein, from liability to either Bertha Hirsch or Carrie Hirsch, the plaintiffs herein, or to David Mayer, on paying into court the amount claimed in the complaint herein to be due as principal and interest, less the costs of this motion, and directing that on said payment into court the policy of insurance upon which this action is brought be surrendered to the said Provident Savings Life Assurance Society of New York, and the plaintiffs having appeared by their counsel, Louis Wertheimer, Esq., and not objecting, and the claimant, David Mayer, having appeared by his counsel, Benno Lewinson, Esq., and consenting to the substitution, and after reading and filing the affidavit of Martin L. Stevens, an officer of the defendant, the Provident Savings Assurance Society of New York, and on motion of Kerr & Curtis, Esqs., attorneys for the defendant, the Provident Savings Life Assurance Society of New York,

It is ordered that on payment by the defendant, the Provident Savings Life Assurance Society of New York, to the Clerk of the County of New York, of the sum of \$5,030.83, that being the amount claimed in the complaint herein, principal and interest to date, less \$10 costs of this motion hereby awarded to the defendant, to the credit of this action, within five days from the entry of this order, David Mayer be substituted as defendant in this action in place of the Provident Savings Life Assurance Society of New York, the defendant herein, and that the said Provident Savings Life Assurance Society of New York be thereupon discharged from liability therefor to either the plaintiffs above-named or said Mayer.

10. Form of supplemental complaint.²⁴

(Title.)

The plaintiffs, for their supplemental complaint herein, by Louis Wertheimer, their attorney, allege:

I. That at all the times hereinafter mentioned, the Provident Savings Life Assurance Society, the former defendant herein, was and still is a corporation duly organized and doing business under the Laws of the State of New York.

II. On information and belief that heretofore and on or about the 30th day of May, 1885, the said Provident Savings Life Assurance Society of New York, for a valuable consideration by it received, duly made, executed, issued and delivered to one Jeannette Hirsch its policy of insurance, dated on that day and numbered 15,113, wherein and whereby it promised and agreed to pay to said Jeannette Hirsch or to her assigns the sum of five thousand dollars within ninety days after due notice of death of Jacob Hirsch, husband of said Jeannette Hirsch, shall have been given to it.

III. That the said Jacob Hirsch died September 30, 1894, and

²⁴. This form is adapted from that used in *Hirsch v. Mayer*, 165 N. Y. 236.

on information and belief that due notice of such death was duly given to said corporation on or about November 20, 1894.

IV. That on October 14, 1894, the said Jeannette Hirsch duly assigned to these plaintiffs said policy and all her right, title and interest in and to any and all moneys to which she then was or at any time thereafter would have been entitled under said policy of insurance above mentioned, and the plaintiffs then became and since then have been and now are the lawful owners and holders of said policy and of the claim for the moneys due and to grow due under said policy.

V. That plaintiffs duly notified said corporation of said assignment of said policy and of said claim, and duly demanded payment thereof, but payment was refused, although the ninety days above mentioned have long since expired.

VI. That this action was brought by plaintiffs against the said corporation for the recovery of the sum of five thousand dollars with interest thereon from February 10, 1895, under and in pursuance of the facts above alleged, and that thereafter and on or about the 29th day of March, 1895, on the application of said corporation an order was duly entered herein directing that on payment by the said corporation, the Provident Savings Life Assurance Society of New York to the Clerk of the County of New York of the sum of \$5,030.83 to the credit of this action within five days from the entry of the said order, David Mayer be substituted as defendant in this action in place of the Provident Savings Life Assurance Society of New York, and that the said Provident Savings Life Assurance Society of New York be thereupon discharged from liability therefor to either the plaintiffs above-named or to said David Mayer.

VII. Upon information and belief that the said moneys so ordered to be deposited as aforesaid were so deposited as directed in said order.

VIII. That thereafter, and on or about the first day of April, 1895, said David Mayer duly appeared in this action by his attorney, Mr. B. Lewinson.

IX. On information and belief that the substituted defendant herein, the said David Mayer, claims the right to receive the said moneys so deposited, but that the grounds, or reasons for such claim, or on which the same is based, these plaintiffs cannot, for want of sufficient information, set forth herein.

X. On information and belief that the said David Mayer is not entitled to the said moneys so deposited, but that plaintiffs are entitled to the same.

Wherefore, plaintiffs demand judgment against the defendant for the sum of five thousand dollars, and interest thereon, from February 10, 1895, besides the costs of this action, and that the moneys so deposited as aforesaid with the Clerk of this County be applied, so far as can be, towards the satisfaction of such judgment.

REDEMPTION.

ARTICLE I.

The Right of Redemption.

	PAGE
A. In general	390
B. Jurisdiction of courts	390
C. Demand or tender before suit	391
D. Real estate mortgage	391
1. Protection of equity of redemption	391
2. Mortgagee in possession	392
3. Defective foreclosure proceedings	392
E. Absolute conveyance intended as security	394
1. In general	394
2. Parol evidence to show defeasance	396
3. Proof required	396
4. Release by grantor of equity of redemption	400
5. Effect of conveyance by grantee	401
6. Rights of mortgagee	401
F. Chattel mortgage.	401
G. Pledge	403
H. Order in summary proceedings	403

ARTICLE II.

Procedure.

A. Limitation of action	404
1. Civil Practice Act, § 46. Action to redeem from a mortgage	404
2. Earlier statutes	404
3. The short limitation in subdivision 2	405
4. Actions to which statute does not apply	405
5. Laches	406
B. By whom maintained	406
1. In general	406
2. Trustee in bankruptcy, assignee for creditors, receiver, etc	407
3. Dowress	407
4. Subsequent lienor	407
C. Against whom maintained	409
D. Complaint	410
1. In general	410
2. Form of complaint to redeem from chattel mortgage	410
3. Another form complaint to redeem from chattel mortgage	412
4. Form of complaint in action by wife	414
5. Form of complaint in action to declare a deed as a mortgage	416
E. Venue	418

	PAGE
F. Trial of issues.....	418
G. Relief granted	419
1. In general.	419
2. Accounting between parties.....	419
3. Rents and profits.....	419
4. Costs and charges of defendant.....	421
5. Improvements by defendant.....	422
6. Time for redemption.....	422
7. Sale of property.....	423
8. Money judgment in lieu of redemption.....	423
9. Re-conveyance to plaintiff.....	423
10. Redemption of part of premises.....	424
11. Relief to subsequent lienors.....	424
12. Relief to part owner of equity.....	425
13. Form of interlocutory judgment, redemption of chattel mortgage	426
14. Form of interlocutory judgment, action by dowress.....	427
15. Form of interlocutory judgment, deed as mortgage.....	428
16. Form of final judgment, redemption of chattel mortgage.....	429
17. Form of final judgment, deed as mortgage.....	430
H. Costs	432

ARTICLE I.

THE RIGHT OF REDEMPTION.

A. In general.

An action of redemption is of purely equitable nature. The necessity for it arises when the owner of an equity of redemption in certain property has not the possession of the property and is not entitled thereto until he pays an obligation due to the one having possession. In an action of redemption the amount of the obligation may be determined, and a decree made allowing the owner of the equity to redeem upon the payment of such sum and otherwise protecting the rights of the parties.

B. Jurisdiction of courts.

Jurisdiction of an action of redemption is normally vested in the Supreme Court. But under section 67 of the Civil Practice Act, a county court may take cognizance of an action relating to a mortgage on real estate situated within the county. Other local courts do not have jurisdiction of the action.¹

1. City Court of New York does not have jurisdiction of an action of redemption. *Oest v. Hendrick*, 76 Misc. 258, 134 N. Y. Supp. 900.

C. Demand or tender before suit.

While some of the earlier cases in general terms expressed the opinion that a tender before the commencement of the suit was a necessary prerequisite to an action for redemption,² it is now clearly established that such a tender is not indispensable.³ A tender is of importance, only in the exercise of the court's discretion as to the costs of the suit.⁴

D. Real estate mortgage.

1. Protection of equity of redemption.

A mortgagor's equity of redemption is guarded by courts of equity. The equitable maxim, "once a mortgage, always a mortgage," forbids any stipulation in the mortgage which might have the effect of vesting an absolute title to the premises in the mortgagee.⁵ The equity may be barred by foreclosure proceedings conducted with no jurisdictional defects;⁶ or the mortgagor may release his equity by an instrument sufficient in form to satisfy the Statute of Frauds. The release may be directly from the mortgagor to the mortgagee, for, although the courts view with jealousy the acquisition of absolute ownership by the mortgagee, there is no rule of law forbidding it where the transaction is fair.⁷

2. *Hall v. Ditson*, 5 Abb. N. C. 198; *Halstead v. Swartz*, 1 T. & C. 559, 46 How. Pr. 289.

3. *Thompson v. Loan Comrs. of Otsego*, 79 N. Y. 54; *Casserly v. Witherbee*, 119 N. Y. 522; *Cleveland v. Rothwell*, 54 App. Div. 14, 66 N. Y. Supp. 241; *Treadwell v. Clark*, 73 App. Div. 473, 77 N. Y. Supp. 350; *Treadwell v. Clark*, 114 App. Div. 493, 100 N. Y. Supp. 1, affirmed, 190 N. Y. 51.

4. *Thompson v. Loan Comrs. of Otsego*, 79 N. Y. 54; *Miner v. Beekman*, 11 Abb. Pr. N. S. 147, 42 How. Pr. 33, 33 Super. Ct. (1 J. & S.) 67, reversed on other grounds, 50 N. Y. 337. And see, *infra*, II-H, Costs.

5. *Remsen v. Hay*, 2 Edw. Ch. 535.

6. *Brown v. Frost*, 10 Paige 243.

Barred by sale.—The equity of redemption is barred by the sale, not by the referee's deed to the purchaser. *Barnard v. Jersey*, 39 Misc. 212, 79 N. Y. Supp. 380.

Loan commissioners.—Upon default for twenty-three days in payment of money due upon a mortgage to the commissioners for loaning the United States Deposit Fund, all title and interest of the mortgagor in the land is gone. The qualified right to redeem thereafter is a special one, available only by strict compliance with the terms of the statute, and is not an equity of redemption with common law incidents. *Pell v. Ulmar*, 18 N. Y. 139.

7. *Remsen v. Hay*, 2 Edw. Ch. 535.

2. Mortgagee in possession.

The redemption of real property from the lien of a mortgage is an ancient branch of the equitable jurisdiction of the court of chancery.⁸ If the mortgagee has entered into possession of the premises through the consent of the mortgagor, either express or implied, the latter or his successors cannot maintain an action of ejectment to recover possession of the premises so long as the mortgage is not fully paid.⁹ His remedy is an equitable action for redemption.¹⁰ An additional reason for the intervention of equity is found in the fact that the mortgagor is entitled to an accounting from the mortgagee as to the rents and profits derived from his possession. A mortgagor may maintain an action of ejectment against a mortgagee who has entered into possession of the premises without his consent;¹¹ but, although there may be said to be an adequate remedy at law, the mortgagor may treat such mortgagee as a mortgagee in possession and maintain an action of redemption.¹² An action of redemption cannot be used merely to recover possession of the property; but in case of wrongful possession the equitable jurisdiction is sustained because of the right of the mortgagor to obtain a decree removing the lien of the mortgage and requiring the mortgagee to account.¹³

The action may be maintained against a mortgagee who is not, and has not been, in possession of the premises.¹⁴ A mortgagor can come into a court of equity and obtain a decree removing the lien of the mortgage.¹⁵

3. Defective foreclosure proceedings.

Where a subsequent grantee, a subsequent lienor, or other person claiming under the mortgagor is a necessary party to proceedings to foreclose the mortgage, but is not made a party or is not served with process according to due process of law, his interest in the equity of redemption is not

8. *McKee v. Murphy*, 34 Super. Ct. (2 J. & S.) 261.

9. *Mickles v. Dillaye*, 17 N. Y. 80; *Pell v. Ulmar*, 18 N. Y. 139; *Chase v. Peck*, 21 N. Y. 581; *Thompson v. Loan Comrs. of Otsego*, 79 N. Y. 54; *Becker v. McCrea*, 193 N. Y. 423; *Wheeler v. Morris*, 15 Super. Ct. (2 Bosw.) 524.

10. *Pell v. Ulmar*, 18 N. Y. 139;

Thompson v. Loan Comrs. of Otsego, 79 N. Y. 54; *Becker v. McCrea*, 193 N. Y. 423.

11. *Reich v. Cochran*, 213 N. Y. 416.

12. *Reich v. Cochran*, 213 N. Y. 416.

13. *Reich v. Cochran*, 213 N. Y. 416.

14. *Reich v. Cochran*, 213 N. Y. 416.

15. *Reich v. Cochran*, 213 N. Y. 416.

divested, and he may maintain an action of redemption.¹⁶ In such a case the purchaser at the foreclosure sale is considered to have succeeded to the rights of the mortgagee and to be a mortgagee in possession, and a person whose rights in the equity of redemption have not been cut off may have relief in an equitable action of redemption.¹⁷ A foreclosure regularly conducted bars the right of redemption, although the mortgagee is the purchaser on the sale.¹⁸ If there is jurisdiction to direct the sale in the foreclosure proceedings, the remedy for irregular procedure is to be found in the foreclosure action, not in an independent action of redemption.¹⁹ If the sale was irregular, the remedy is a motion for a re-sale.²⁰ The purchaser cannot by motion be compelled

16. *Brainard v. Cooper*, 10 N. Y. 356; *Mills v. VanVoorhies*, 20 N. Y. 412; *Gage v. Brewster*, 31 N. Y. 218; *Winslow v. Clark*, 47 N. Y. 261; *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126; *McKenna v. Fidelity Trust Co.*, 184 N. Y. 411; *Finn v. Lally*, 1 App. Div. 411, 72 St. Rep. 492, 37 N. Y. Supp. 437; *McMichael v. Russell*, 68 App. Div. 104, 74 N. Y. Supp. 212; *Ralston v. Fifth Ave. Bond & Mrtg. Co.*, 130 Misc. 556, 224 N. Y. Supp. 44; *Wetmore v. Roberts*, 10 How. Pr. 51; *Ross v. Boardman*, 22 Hun 527; *Belden v. Slade*, 26 Hun 635; *Taggart v. Rogers*, 49 Hun 265, 17 St. Rep. 320, 3 N. Y. Supp. 322; *Sheldon v. Hoffnagle*, 51 Hun 473, 21 St. Rep. 637, 4 N. Y. Supp. 287; *Campbell v. Ellwanger*, 81 Hun 259, 62 St. Rep. 754, 30 N. Y. Supp. 792.

17. *Miner v. Beekman*, 50 N. Y. 337; *Naylor v. Colville*, 20 App. Div. 581, 47 N. Y. Supp. 267; *McMichael v. Russell*, 68 App. Div. 104, 74 N. Y. Supp. 212; *Russ v. Strattan*, 11 Misc. 565, 66 St. Rep. 96, 32 N. Y. Supp. 767; *Campbell v. Ellwanger*, 81 Hun 259, 62 St. Rep. 754, 30 N. Y. Supp. 792; *Benedict v. Gilman*, 4 Paige 58; *Wheeler v. Morris*, 15 Super. Ct. (2 Bosw.) 524.

If the mortgagor was not a party, it is said that the purchaser is not a mortgagee in possession as against the

mortgagor, but is a stranger. *Schrivver v. Schriver*, 86 N. Y. 575.

18. *Barnard v. Jersey*, 39 Misc. 212, 79 N. Y. Supp. 380; *Lansing v. Goelet*, 9 Cow. 346.

19. *Brown v. Frost*, 10 Paige 243. "An original bill in chancery cannot be filed by a party to a foreclosure suit, to set aside a master's sale under a decree, where relief could have been obtained, by a summary application to the court, in the foreclosure suit. Where the master sells property, under a decree in chancery, at an improper time, or in such a manner as to prevent a fair competition, or if for any other cause it is inequitable that such sale should be permitted to stand, the proper remedy of the party aggrieved is by a summary application to the court, in the suit in which the decree was made, to set aside the sale upon such terms and conditions as may be just; so as to protect the rights of the purchaser as well as of the parties interested in such sale. The owner of the equity of redemption is not entitled to redeem the mortgaged premises, after the same have been put up and sold under the decree, although the mortgagee becomes the purchaser at such sale." *Brown v. Frost*, 10 Paige 243.

20. *Douglass v. Woodworth*, 51 Barb. 79.

to convey the premises to a party who might have a right to redeem.²¹ But, if the mortgagor, after tendering to the mortgagee during the pendency of foreclosure proceedings the sum due on the mortgage, is induced to permit the mortgagee to buy the property on the foreclosure on his promise to convey to the mortgagor, but the mortgagee refuses thus to convey the property, the mortgagor may have relief in an action of redemption.²²

E. Absolute conveyance intended as security.

1. In general.

A conveyance, although absolute in form, if intended merely as security for a debt or obligation, is a mortgage.²³ No unusual difficulty is presented by a mortgage in the form

21. *Douglass v. Woodworth*, 51 Barb. 79.

22. *Clark v. Levy*, 130 App. Div. 389, 114 N. Y. Supp. 890.

23. *Lawrence v. Farmers' Loan & Trust Co.*, 13 N. Y. 200; *Murray v. Walker*, 31 N. Y. 399; *Kraemer v. Adelsberger*, 122 N. Y. 467; *Mooney v. Byrne*, 163 N. Y. 86; *Braun v. Vollner*, 89 App. Div. 43, 85 N. Y. Supp. 319; *Luesenhop v. Einsfeld*, 93 App. Div. 68, 87 N. Y. Supp. 268, reversed, 184 N. Y. 590; *Conover v. Palmer*, 123 App. Div. 817, 108 N. Y. Supp. 480; *Thompson v. Lewis*, 182 App. Div. 556, 169 N. Y. Supp. 501; *Melenky v. Melen*, 206 App. Div. 46, 200 N. Y. Supp. 730; *Belle Ayre Conservation Co. v. State*, 214 App. Div. 127, 211 N. Y. Supp. 641; *Faulkner v. Cody*, 45 Misc. 64, 91 N. Y. Supp. 633; *Conover v. Palmer*, 60 Misc. 241, 111 N. Y. Supp. 1074; *Clark v. Henry*, 2 Cow. 324; *Simon v. Schmidt*, 41 Hun 318, 2 St. Rep. 388.

Subsequent defeasance.—A defeasance, although dated a few days subsequent to the date of the deed, may be construed as a part of the same transaction. *Kraemer v. Adelsberger*, 122 N. Y. 467.

Bankruptcy proceedings.—A deed by the owner of property to his wife,

made within four months of bankruptcy, will be construed to be a mortgage, where it appears that, after the grantor became bankrupt, his wife filed a claim in the bankruptcy proceedings in which she stated that the deed was held by her as security for money loaned, and that she would surrender and relinquish all security and would make any agreement or conveyance necessary to effectuate that purpose, and where, during the pendency of the bankruptcy proceedings, she redeemed the property to her husband. Accordingly, the defendant who acquired title to the property through the trustee in bankruptcy, had title thereto superior to that of the plaintiff, who acquired title through the daughter of the bankrupt, who was his sole devisee, for the deed by the bankrupt's wife to the bankrupt during the pendency of the bankruptcy proceedings amounted to no more than a satisfaction of her mortgage which was represented by the deed from the bankrupt to her, and, therefore, the title to the land was in the bankrupt at the time of the intervention of bankruptcy and passed by the trustee's deed. *Belle Ayre Conservation Co. v. State*, 214 App. Div. 127, 211 N. Y. Supp. 641.

of an absolute conveyance, if the defeasance is in writing and can be produced in court. Although the conveyance and the defeasance are separate instruments they may be construed as one, and the grantor may, in a proper case, maintain an action for redemption.²⁴ The defeasance may be in the form of a declaration of trust.²⁵ The deed may be merely as security although it is executed by a third party,²⁶ or to a third party.²⁷ A debt is a necessary element of a mortgage.²⁸ If neither the papers nor the parol evidence indicates the existence of a debt, the conveyance cannot be a mortgage. But the law does not forbid a debtor from making an absolute conveyance to his creditor.²⁹ If an absolute conveyance is intended, it will be upheld both in law and in equity. A deed given in satisfaction of a debt is not a mortgage,³⁰ although the grantor is given an option of re-purchase.³¹ Upon the sale and conveyance of lands the grantor and grantee may contract with each other for a re-sale, and such a contract does not divest the title acquired by the deed or convert it into a mortgage.³² There may be an agreement for a conditional re-sale without creating a mortgage.³³

24. *Mooney v. Byrne*, 163 N. Y. 86; *Conover v. Palmer*, 60 Misc. 241, 111 N. Y. Supp. 1074; *Brockway v. Wells*, 1 Paige 617.

25. *Lawrence v. Farmers' Loan & Trust Co.*, 13 N. Y. 200; *Thompson v. Lewis*, 182 App. Div. 556, 169 N. Y. Supp. 501; *Norris v. Schuyler*, 4 N. Y. Supp. 558, 23 St. Rep. 84.

26. *Stoddard v. Whiting*, 26 N. Y. 627; *Carr v. Carr*, 52 N. Y. 251; *Melenky v. Melen*, 206 App. Div. 46, 200 N. Y. Supp. 730.

Patent.—If one, holding as assignee and for security a certificate of sale by the state from the surveyor-general, pays the balance due the state, and takes a patent for the premises, he holds as mortgagee in equity. *Murray v. Walker*, 31 N. Y. 399.

27. *Thompson v. Lewis*, 162 App. Div. 556, 169 N. Y. Supp. 501.

28. *Bascombe v. Marshall*, 129 App. Div. 516, 113 N. Y. Supp. 991, affirmed without opinion, 198 N. Y. 538.

Promise to pay.—Where a deed, absolute on its face, is claimed to have been intended simply as a mortgage, proof of an express promise to pay on the part of the alleged mortgagor is not absolutely essential to sustain the claim; the absence of such a promise tends strongly to disprove it, but is not conclusive against it. *Morris v. Budlong*, 78 N. Y. 543.

29. *Braun v. Vollmer*, 89 App. Div. 43, 85 N. Y. Supp. 319.

30. *Randall v. Sanders*, 87 N. Y. 578.

31. *Randall v. Sanders*, 87 N. Y. 578; *Reich v. Dyer*, 180 N. Y. 107; *Braun v. Vollmer*, 89 App. Div. 43, 85 N. Y. Supp. 319.

32. *Morris v. Budlong*, 78 N. Y. 543; *Randall v. Sanders*, 87 N. Y. 578; *Braun v. Vollmer*, 89 App. Div. 43, 85 N. Y. Supp. 319; *Brown v. Dewey*, 2 Barb. 28.

33. *Hill v. Grant*, 46 N. Y. 496.

2. Parol evidence to show defeasance.

In equity parol evidence is admissible to show that a conveyance absolute in form was intended merely as a mortgage,⁸⁴ or that a written defeasance has been lost or destroyed.⁸⁵ It is not essential that the mortgagor also show some fraud or mistake in the inception of the grant.⁸⁶ When the instrument has been established as a mortgage, relief as in an action of redemption is permitted.⁸⁷ The difference between the redemption of a mortgage in this form and of one in the usual form, is that an adjudication as to the nature of the instrument is necessary. The action is brought to have the deed or conveyance declared to be a mortgage, and redemption is asked as additional relief. The question is usually presented to the court when the grantor seeks to avoid the absolute nature of a deed of real estate, but a bill of sale of personal property may, in some cases, where there is no adequate remedy at law, form the basis for an action in equity.⁸⁸

3. Proof required.

There is a strong presumption that a formal conveyance correctly expresses the agreement of the parties,⁸⁹ and when

34. *Stoddart v. Whiting*, 46 N. Y. 627; *Carr v. Carr*, 52 N. Y. 251; *Meehan v. Forrester*, 52 N. Y. 277; *Ensign v. Ensign*, 120 N. Y. 655; *Barry v. Colville*, 129 N. Y. 302; *Spencer v. Richmond*, 46 App. Div. 481, 61 N. Y. Supp. 397; *Reich v. Cochran*, 213 N. Y. 416; *Farmers & Merchants' Bk. v. Smith*, 61 App. Div. 315, 70 N. Y. Supp. 536; *Murray v. Sweasy*, 69 App. Div. 45, 74 N. Y. Supp. 543; *Matter of Holmes*, 79 App. Div. 264, 79 N. Y. Supp. 592, affirmed without opinion, 176 N. Y. 603; *Charles T. Streeter Constr. Co. v. Kenny*, 209 App. Div. 697, 205 N. Y. Supp. 611; *Richardson v. Beaber*, 62 Misc. 542, 115 N. Y. Supp. 821; *Tibbs v. Morris*, 44 Barb. 138; *Marks v. Pell*, 1 Johns. Ch. 594; *Brown v. Clifford*, 7 Lans. 46, appeal dismissed, 54 N. Y. 636; *Haas v. Nauert*, 19 St. Rep. 472, 2 N. Y. Supp. 723; *Slee v. Manhattan Co.*, 1 Paige 48; *VanBuren v. Olmstead*, 5 Paige 9.

35. *Marks v. Pell*, 1 Johns. Ch. 594.

36. *Barry v. Colville*, 129 N. Y. 302; *Brown v. Clifford*, 7 Lans. 46, appeal dismissed, 54 N. Y. 636.

37. *Terrett v. Crombie*, 55 N. Y. 683; *Palmer v. Rotary Realty Co.*, 109 Misc. 431, 178 N. Y. Supp. 813, affirmed, 193 App. Div. 887, 182 N. Y. Supp. 941, 198 App. Div. 1017, 190 N. Y. Supp. 944.

38. *Castoriano v. Dupe*, 145 N. Y. 250.

Patent.—A deed of a patent interest may be shown to be merely as security. *Barry v. Colville*, 129 N. Y. 302.

39. *Ensign v. Ensign*, 120 N. Y. 655; *Harris v. Hirsch*, 121 App. Div. 767, 106 N. Y. Supp. 631; *Coburn v. Anderson*, 62 How. Pr. 268; *Shattuck v. Bascom*, 55 Hun 14, 28 St. Rep. 657. "The burden of establishing an oral defeasance to such a deed is an onerous one resting on whoever alleges it, and its existence, and also its precise terms,

a party seeks to make such a radical change as to add a defeasance thereto, an onerous burden of evidence is imposed. The courts have expressed the burden of evidence in various phrases, but all to the effect that the proof must be clear and satisfactory.⁴⁰ It is said that the evidence must be "clear, unequivocal and convincing."⁴¹ Other expressions are sometimes used, such as that the evidence must be "very satisfactory,"⁴² "clear, explicit and unequivocal,"⁴³ "clear, satisfactory and convincing,"⁴⁴ or "clear and conclusive."⁴⁵ The statement that the evidence should be "beyond a reasonable doubt," while sometimes made by the courts, is not to be approved, for that degree of proof is more correctly required only on criminal trials.

Each case must be determined upon its own special facts.⁴⁶

must be established by clear and conclusive evidence, otherwise the strong presumption that the deed expresses the entire contract between the parties to it is not overcome. A conveyance of land in fee so executed, acknowledged and recorded is of too great solemnity and of too much importance to be set aside or converted into a mere security upon loose or uncertain testimony, and it will not be unless the existence of the alleged oral defeasance is established beyond a reasonable doubt." *Ensign v. Ensign*, 120 N. Y. 655.

40. *Kaussknecht v. Smith*, 11 App. Div. 185, 42 N. Y. Supp. 611, affirmed without opinion, 161 N. Y. 663; *Harris v. Hirsch*, 121 App. Div. 767, 106 N. Y. Supp. 631; *Bascombe v. Marshall*, 129 App. Div. 516, 113 N. Y. Supp. 991, affirmed without opinion, 198 N. Y. 538; *Thornley v. Thornley*, 3 Misc. 597, affirmed without opinion, 143 N. Y. 668; *Miller v. McGuckin*, 15 Abb. N. C. 204; *Coburn v. Anderson*, 62 How. Pr. 268; *Haas v. Nauert*, 19 St. Rep. 472, 2 N. Y. Supp. 723; *Clifford v. Gates*, 53 St. Rep. 877, 23 N. Y. Supp. 1085; *Ensign v. Ensign*, 28 Week. Dig. 25, 14 St. Rep. 181, affirmed, 120 N. Y. 655. "The burden of proof rested upon the defendant to overcome the strong presumption arising from the terms of a written in-

strument. The rule is that if the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A deliberate deed or writing is of too much solemnity to be brushed away by loose or inconclusive proofs." *Shattuck v. Bascom*, 55 Hun 14, 28 St. Rep. 657.

41. *Richardson v. Beaber*, 62 Misc. 542, 115 N. Y. Supp. 821; *Erwin v. Curtis*, 6 St. Rep. 116, 43 Hun 292, 26 Week. Dig. 179, affirmed, 112 N. Y. 660; *Barton v. Lynch*, 52 St. Rep. 540, 69 Hun 1, 23 N. Y. Supp. 217.

42. *Thornley v. Thornley*, 3 Misc. 597, affirmed without opinion, 143 N. Y. 668.

43. *Erwin v. Curtis*, 6 St. Rep. 116, 43 Hun 292, 26 Week. Dig. 179, affirmed, 112 N. Y. 660.

44. *Sumner v. Sumner*, 128 Misc. 404, 219 N. Y. Supp. 31, affirmed without opinion, 211 App. Div. 760, 222 N. Y. Supp. 908.

45. *Ensign v. Ensign*, 120 N. Y. 655; *Farmers & Merchants Bk. v. Smith*, 61 App. Div. 315, 70 N. Y. Supp. 536; *Charles T. Streeter Constr. Co. v. Kenny*, 209 App. Div. 697, 205 N. Y. Supp. 611.

46. *Murray v. Sweasy*, 69 App. Div.

The agreement between the parties may be implied from the circumstances.⁴⁷ Whether a deed which, on its face, conveys the premises covered by it in fee is and was intended to be a mortgage, is a mixed question of fact and law. It is a mortgage only when it was the understanding and agreement of the parties that it should be a mortgage.⁴⁸ The fact that the consideration was less than the value of the premises at the time of the deed,⁴⁹ or that the grantor has continued in possession of the premises or did other acts of ownership, after the execution of the deed,⁵⁰ or that payments which may be principal or interest have been made by the grantor,⁵¹ tend to show that the instrument is but a mortgage; but such facts are not, of themselves, conclusive, and may in a specific case be easily explained. The probative force of these facts is to be weighed with all the other facts in the case.⁵² The important fact is the intent of the parties—whether they intended an absolute conveyance or one merely as security.⁵³ In doubtful cases the

45, 74 N. Y. Supp. 543; *Bascombe v. Marshall*, 129 App. Div. 516, 113 N. Y. Supp. 991, affirmed without opinion, 198 N. Y. 538; *Melenky v. Melen*, 206 App. Div. 46, 200 N. Y. Supp. 730; *Erwin v. Curtis*, 6 St. Rep. 116, 43 Hun 292, 26 Week. Dig. 179, affirmed, 112 N. Y. 660. "It is impossible to formulate an inflexible rule of law for the determination in all cases of the relation between evidence and proof; but each case must be decided, in the light of general rules, on its own facts and circumstances. Whether the evidence in a particular case amounts to proof of the issues tendered is generally a question for the final determination of the court having original jurisdiction to try it, subject to review by the appellate court invested by the statute with power to re-examine the determination of the issues of fact. The referee's determination of the issue having been affirmed by the General Term, this court cannot reverse if there is any evidence tending to sustain the finding of the fact

on which the judgment rests." *Ensign v. Ensign*, 120 N. Y. 655.

47. *Farmers & Merchants Bk. v. Smith*, 61 App. Div. 315, 70 N. Y. Supp. 536; *Melenky v. Melen*, 206 App. Div. 46, 200 N. Y. Supp. 730.

48. *Brown v. Clifford*, 7 Lans. 46, appeal dismissed, 54 N. Y. 636.

49. *Bascombe v. Marshall*, 129 App. Div. 516, 113 N. Y. Supp. 991, affirmed without opinion, 198 N. Y. 538; *Johnson v. Woodworth*, 134 App. Div. 715, 119 N. Y. Supp. 146.

50. *Bascombe v. Marshall*, 129 App. Div. 516, 113 N. Y. Supp. 991, affirmed without opinion, 198 N. Y. 538; *Melenky v. Melen*, 206 App. Div. 46, 200 N. Y. Supp. 730; *Faulkner v. Cody*, 45 Misc. 64, 91 N. Y. Supp. 633.

51. *Faulkner v. Cody*, 45 Misc. 64, 91 N. Y. Supp. 633.

52. *Bascombe v. Marshall*, 129 App. Div. 516, 113 N. Y. Supp. 991, affirmed without opinion, 198 N. Y. 538.

53. *Kraemer v. Adelsberger*, 122 N. Y. 467; *Conover v. Palmer*, 123 App. Div. 817, 108 N. Y. Supp. 480.

courts are inclined to treat the conveyance as a mortgage.⁵⁴ The verbal admissions of the grantee are, standing alone, not satisfactory proof of the nature of the instrument.⁵⁵ It is said that, "the testimony of admissions is of very little weight."⁵⁶ And, of course, the self-serving declarations of the grantor, whether verbal or written, are of no substantial aid.⁵⁷ The testimony of a witness whose credibility has been impeached, is not sufficient.⁵⁸

If it clearly appears that the deed was not intended as an absolute conveyance, but was subject to some agreement, and the dispute relates to the specific agreement, the burden on the plaintiff is only to show by a fair preponderance of evidence that the agreement was as alleged in his complaint.⁵⁹

If the trial court has found against the party claiming the instrument was but a mortgage, an appellate court will rarely interfere with its conclusion.⁶⁰

54. *Conover v. Palmer*, 123 App. Div. 817, 108 N. Y. Supp. 480.

55. *Marks v. Pell*, 1 Johns. Ch. 594.

56. *Bascombe v. Marshall*, 129 App. Div. 516, 113 N. Y. Supp. 991, affirmed without opinion, 198 N. Y. 538.

57. *Sumner v. Sumner*, 128 Misc. 404, 219 N. Y. Supp. 31, affirmed without opinion, 211 App. Div. 760, 222 N. Y. Supp. 906.

58. *Matter of Holmes*, 79 App. Div. 264, 79 N. Y. Supp. 592, affirmed without opinion, 176 N. Y. 603.

59. *Murray v. Sweasy*, 69 App. Div. 45, 74 N. Y. Supp. 543.

60. *Fullerton v. McCurdy*, 55 N. Y. 637; *Harris v. Hirsch*, 121 App. Div. 767, 106 N. Y. Supp. 631; *Bascombe v. Marshall*, 129 App. Div. 516, 113 N. Y. Supp. 991, affirmed without opinion, 198 N. Y. 538; *Charles T. Streeter Constr. Co. v. Kenny*, 209 App. Div. 697, 205 N. Y. Supp. 611; *Thornley v. Thornley*, 3 Misc. 597, affirmed without opinion, 143 N. Y. 668; *Barton v. Lynch*, 52 St. Rep. 540, 69 Hun. 1, 23 N. Y. Supp. 217. But see, *Johnson v. Woodworth*, 134 App. Div. 715,

119 N. Y. Supp. 146. "I am not able to extract from the judicial saying that the evidence 'must be clear, unequivocal and convincing,' nor from the cases in which the like words have been used, any certain standard by which to measure the proofs in a case of this kind; the words seem rather an amulet for the trial judge. Cases of this kind depend largely upon the existence or non-existence of extrinsic facts, and circumstances resting in parol testimony; and the establishment of those facts and circumstances to the satisfaction of the trial judge, will depend largely on the character of the witnesses, the consistency of their testimony, and even the manner and appearance of witnesses on the stand. Consequently, on appeal, in looking into the evidence to see if the facts found, are properly sustained by the evidence, as in ordinary cases, some consideration will have to be given to the better position of the trial judge for estimating the value of the testimony." *Haas v. Nauert*, 19 St. Rep. 472, 2 N. Y. Supp. 723.

4. Release by grantor of equity of redemption.

It is an equitable maxim that, "Once a mortgage, always a mortgage."⁶¹ That is to say, if an instrument is intended to operate as a mortgage, a stipulation therein which has the effect of divesting the mortgagor of his equity of redemption is void although based on a good consideration.⁶² The right to redeem is carefully protected by courts of equity.⁶³ If the instrument is in its essence a mortgage, the parties cannot by any stipulations, however express and positive, render it anything but a mortgage, or deprive it of the essential attributes belonging to a mortgage in equity. The debtor or mortgagor cannot, in the inception of the instrument, as a part of or collateral to its execution, in any manner deprive himself of his equitable right to come in after a default in paying the money at the stipulated time, and to pay the debt and interest, and thereby redeem the land from the lien and encumbrance of the mortgage; the equitable right of redemption, after a default is preserved, remains in full force, and will be protected and enforced by a court of equity, no matter what stipulations the parties may have made in the original transaction purporting to cut off this right.⁶⁴ The rule does not render it impossible for the mortgagor by a subsequent writing to convey his equity of redemption to the mortgagee. The mortgagor can release his equity by any instrument which satisfies the Statute of Frauds, but not otherwise.⁶⁵ Thus, a physical destruction of the written defeasance, with the intent to make the deed absolute and cut off the right of redemption, will not have that effect.⁶⁶ A general release will not divest him of his equity.⁶⁷

61. *Massari v. Giradi*, 119 Misc. 607, 197 N. Y. Supp. 751; *Clark v. Henry*, 2 Cow. 324.

62. *Murray v. Walker*, 31 N. Y. 399; *Mooney v. Byrne*, 163 N. Y. 86; *Thompson v. Lewis*, 182 App. Div. 556, 169 N. Y. Supp. 501; *Faulkner v. Cody*, 45 Misc. 64, 91 N. Y. Supp. 633; *Massari v. Giradi*, 119 Misc. 07, 197 N. Y. Supp. 751; *Clark v. Henry*, 2 Cow. 324; *Simon v. Schmidt*, 41 Hun 318, 2 St. Rep. 388.

63. *Clark v. Henry*, 2 Cow. 324.

64. *Faulkner v. Cody*, 45 Misc. 64, 91 N. Y. Supp. 633.

65. *Luesenhop v. Einsfield*, 93 App. Div. 68, 87 N. Y. Supp. 268, reversed, 184 N. Y. 590; *Massari v. Giradi*, 119 Misc. 607, 197 N. Y. Supp. 751.

66. *Conover v. Palmer*, 60 Misc. 241, 111 N. Y. Supp. 1074.

67. *Luesenhop v. Einsfield*, 93 App. Div. 68, 87 N. Y. Supp. 268, reversed 184; N. Y. 590.

5. Effect of conveyance by grantee.

If the grantee named in a conveyance, absolute on its face, but intended to operate as a mortgage, conveys the premises to a purchaser in good faith, such purchaser acquires a good title.⁶⁸ A *bona fide* lessee of the premises is also protected.⁶⁹ The remedy of the mortgagor is then aimed at the proceeds of the property.⁷⁰ But a title acquired with knowledge of the equity of redemption is subordinate thereto.⁷¹

6. Rights of mortgagee.

The grantee named in an absolute conveyance intended as a mortgage has the rights as well as the liabilities of a mortgagee. He may bring an action at law to secure the amount unpaid on the debt.⁷² A foreclosure of the instrument as a mortgage may be had, and the mortgagor may be liable for a deficiency judgment.⁷³ He cannot maintain an action of ejectment to recover possession of the premises.⁷⁴

F. Chattel mortgage.

A chattel mortgage conveys the legal title of the mortgaged goods to the mortgagee. Before default he has a defeasible title which may become absolute upon the failure of the mortgagor to pay the debt. After default, the title of the mortgagee is absolute, and the mortgagor has no interest therein, except a right to redeem.⁷⁵ This right of

68. *Meehan v. Forrester*, 52 N. Y. 277; *Minton v. N. Y. El. R. Co.*, 130 N. Y. 332; *Richardson v. Beaber*, 62 Misc. 542, 115 N. Y. Supp. 821, *Brockway v. Wells*, 1 Paige 617.

69. *Dias v. Merle*, 4 Paige 259.

70. *Meehan v. Forrester*, 52 N. Y. 277; *Mooney v. Byrne*, 163 N. Y. 86; *Kaussknecht v. Smith*, 11 App. Div. 186, 42 N. Y. Supp. 611, affirmed without opinion, 161 N. Y. 663; *Doty v. Norton*, 133 App. Div. 106, 117 N. Y. Supp. 793; *Richardson v. Beaber*, 62 Misc. 542, 115 N. Y. Supp. 821; *Oest v. Hendrick*, 76 Misc. 258, 134 N. Y. Supp. 900; *Brockway v. Wells*, 1 Paige 617.

71. *Dias v. Merle*, 4 Paige 259.

72. *Drovers' Deposit Nat. Bank v. Newgass*, 161 App. Div. 769, 147 N. Y. Supp. 4.

73. *Dickey v. Goertner*, 146 N. Y. Supp. 264.

74. *Murray v. Walker*, 31 N. Y. 399; *Carr v. Carr*, 52 N. Y. 251.

75. *West v. Crary*, 47 N. Y. 423; *Bragelman v. Daue*, 69 N. Y. 69; *Hughes v. Harlam*, 166 N. Y. 427; *Reich v. Cochran*, 213 N. Y. 416; *Cartier v. Pabst Brewing Co.*, 112 App. Div. 419, 98 N. Y. Supp. 516; *Bank of Lansingburgh v. Crary*, 1 Barb. 542; *Hinman v. Judson*, 13 Barb. 629; *Carter v. Stevens*, 3 Denio 33; *Pratt v.*

redemption cannot be waived by a clause in the chattel mortgage.⁷⁶ The equity of redemption may be lost by voluntary release or transfer, by a sale in foreclosure proceedings, a proper sale under the power of sale contained in the mortgage, or by the lapse of time.⁷⁷ If not so lost, the mortgagor or his successor in interest may maintain an action of redemption against a mortgagee having possession of the goods.⁷⁸ He cannot maintain an action at law, such as replevin, to recover possession of the chattels.⁷⁹ Nor can an action be maintained to recover as damages the difference between the value of the goods and price at which they were sold.⁸⁰ But under modern practice, it is permissible in some cases to bring the action in form one to secure a declaratory judgment, and the court in this form of action can decree a redemption.⁸¹

The question sometimes arises when the mortgagee at an unfair sale has purchased the goods for a grossly inadequate price, and in such a case the mortgagor, or his successor in interest is allowed to maintain an action of redemption.⁸²

Stiles, 17 How. Pr. 211, 9 Abb. Pr. 150; King v. VanVleck, 40 Hun 68; Halstead v. Swartz, 1 T. & C., 559, 46 How. Pr. 289; Randall v. Dunbar, 14 Week. Dig. 332; Patchin v. Pierce, 12 Wend. 61. And see, Griffin & Curtis on Chattel Mortgages and Conditional Sales, p. 3.

76. Hughes v. Harlam, 166 N. Y. 427.

77. Halstead v. Swartz, 1 T. & C., 570, 46 How. Pr. 289; Griffin & Curtis on Chattel Mortgages and Conditional Sales, p. 130.

Attachment.—The right of a mortgagor, to redeem a chattel taken by a mortgagee, is not the subject of an attachment. Cutler v. James Goold Co., 43 Hun 516, 7 St. Rep. 106, 26 Week. Dig. 342.

78. Casserly v. Witherbee, 119 N. Y. 522; Reich v. Cochran, 213 N. Y. 416; Cartier v. Pabst Brewing Co., 112 App. Div. 419, 98 N. Y. Supp. 516; Bunacleugh v. Poolman, 3 Daly 236;

Stoddard v. Denison, 38 How. Pr. 296, 7 Abb. Pr. N. S. 309, 32 Super. Ct. (2 Sweeney) 54; Randall v. Dunbar, 14 Week. Dig. 332; Patchin v. Pierce, 12 Wend. 61.

79. Castoriano v. Dupe, 145 N. Y. 250; Cartier v. Pabst Brewing Co., 112 App. Div. 419, 98 N. Y. Supp. 516; Stoddard v. Denison, 38 How. Pr. 296, 7 Abb. Pr. N. S. 309, 32 Super. Ct. (2 Sweeney) 54; Halstead v. Swartz, 1 T. & C. 559, 46 How. Pr. 289. Griffin & Curtis on Chattel Mortgages and Conditional Sales, p. 128.

80. Cartier v. Pabst Brewing Co., 112 App. Div. 419, 98 N. Y. Supp. 516; Stoddard v. Denison, 38 How. Pr. 296, 7 Abb. Pr. N. S. 309, 32 Super. Ct. (2 Sweeney) 54.

81. Halliday v. McGraw, 231 N. Y. 382.

82. Casserly v. Witherbee, 119 N. Y. 522; Stoddard v. Denison, 38 How. Pr. 296, 7 Abb. Pr. N. S. 309, 32 Super. Ct. (2 Sweeney) 54.

G. Pledge.

As a general rule, an action in equity will not lie to redeem personal property pledged for a debt.⁸³ There are, however, recognized exceptions to the rule. If it is necessary to have an accounting to ascertain the amount of the pledgor's indebtedness, a court of equity may assume jurisdiction.⁸⁴ Or, if the circumstances are such that the holder of the property is required to account to the pledgor for rents and profits derived from the possession of the property, equity may intervene.⁸⁵ Likewise, if the property has been transferred and is not replaceable and has a peculiar value to the pledgor, and a remedy by damages is therefore inadequate, equity may be influenced to determine the controversy.⁸⁶

H. Order in summary proceedings.

Where a tenant is dispossessed from the demised premises for failure to pay rent, and the unexpired term of the lease exceeds five years, upon a tender of the unpaid rent within one year, the tenant may have a redemption of the lease.⁸⁷ And, if the tenant fails to redeem, a judgment creditor or mortgagee of the lease may have the right of redemption.⁸⁸ The usual remedy for the enforcement of this right of redemption is by petition and order under section 1440 of the Civil Practice Act. But, in addition to the statutory remedy, there seems to be a remedy by an action in equity for the redemption of the lease.⁸⁹

⁸³ *Treadwell v. Clark*, 190 N. Y. 51; *Treadwell v. Clark*, 73 App. Div. 473, 77 N. Y. Supp. 350; *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. Supp. 681; *Durant v. Einstein*, 28 Super. Ct. (5 Rob.) 423, 35 How. Pr. 223.

⁸⁴ *Treadwell v. Clark*, 190 N. Y. 51; *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. Supp. 681.

⁸⁵ *Treadwell v. Clark*, 190 N. Y. 51; *Smith v. Staten Island Land Co.*, 175 App. Div. 588, 162 N. Y. Supp. 681; *Hasbrouck v. Vanderwoort*, 6 Super. Ct. (4 Sandf.) 74.

⁸⁶ *Treadwell v. Clark*, 190 N. Y. 51; *Treadwell v. Clark*, 73 App. Div. 473, 77 N. Y. Supp. 350.

⁸⁷ Civ. Prac. Act, § 1437; *Terwilliger v. Browning, King & Co.*, 222 N. Y. 47; *Bien v. Bixby*, 22 Misc. 126, 48 N. Y. Supp. 810. See, *Fiero on Particular Actions and Proceedings*, vol. 3, p. 3228.

⁸⁸ Civ. Prac. Act, § 1438.

⁸⁹ See, *Jacob Hoffman Brewing Co. v. Wuttge*, 234 N. Y. 469; *H. Koehler & Co. v. Brady*, 78 Hun 443, 29 N. Y. Supp. 61 St. Rep. 49, reversed on other grounds, 144 N. Y. 135.

ARTICLE II.

PROCEDURE.

A. Limitation of action.

1. Civil Practice Act, § 46. Action to redeem from a mortgage.

Subdivision 1. An action to redeem real property from a mortgage with or without an account of rents and profits may be maintained by the mortgagor or those claiming under him against the mortgagee in possession, or the purchaser of the mortgaged premises at a foreclosure sale in an action in which said mortgagor or those claiming under him were not excluded from their interest in said mortgaged premises, or those claiming under them, unless he or they have continuously maintained possession of the mortgaged premises for twenty years after the breach of a condition of the mortgage, or the non-fulfillment of a covenant therein contained, or the date of the recording of the deed of said premises to such purchaser.

Subdivision 2. In all cases where prior to September first, nineteen hundred and twenty-four, an action to redeem real property is or shall be maintainable under the provisions of this section, the right to maintain such action to redeem shall be barred unless the person or persons so entitled to maintain such action shall within one year after this act takes effect bring an action to redeem said real property from said mortgage pursuant to the provisions of this section, and a notice of the pendency of such action be duly filed.

2. Earlier statutes.

In the earlier cases it was held that quiet and uninterrupted possession by a mortgagee for twenty years without any account or acknowledgment of a subsisting mortgage was a bar to the equity of redemption, but that no shorter period has this effect.⁹⁰ But no lapse of time barred the right to redeem, so long as the mortgage had been treated between the parties as a subsisting mortgage and security only.⁹¹ Thus, an assignment of the mortgage or the commencement of foreclosure proceedings were considered an acknowledgment of the security and kept the statute from running.⁹² The Code of Procedure of 1848 contained no limitation expressly applying to an action to redeem, and hence the action was held to be within the ten year limitation contained in the provision which was similar to that now contained in section 53 of the Civil Practice Act.⁹³ The

90. *Calkins v. Calkins*, 3 Barb. 305;
Moore v. Cable, 1 Johns. Ch. 385;
Demarest v. Wynkoop, 3 Johns. Ch.
 129.

91. *Calkins v. Calkins*, 3 Barb. 305;
Marks v. Pell, 1 Johns. Ch. 594.

92. *Calkins v. Calkins*, 3 Barb. 305;
Borst v. Boyd, 3 Sandf. Ch. 501.

93. *Miner v. Beekman*, 50 N. Y. 337;
Hubbell v. Sibley, 50 N. Y. 468.

cause of action was then deemed to accrue at the time of the entry of the mortgagee under claim of title.⁹⁴ The Code of Civil Procedure, section 379, contained an express limitation of twenty years applicable to an action to redeem lands in the possession of a mortgage, but used the word "adverse" so that the statute ran only when the possession was in hostility to the mortgagor.⁹⁵ If the mortgagee entered with the consent of the mortgagor, his possession was not adverse.⁹⁶ In 1919, the term "adverse" was stricken from the statute,⁹⁷ but it was thought that this amendment was not retroactive so as to be enforced as an absolute defense.⁹⁸

3. The short limitation in subdivision 2.

Subdivision 2 of section 46 of the Civil Practice Act assumes to require all actions accruing prior to September 1, 1924, to be commenced within one year from that date. A statute of limitations must be reasonable, and there are substantial grounds for asserting that a statute which apparently permits a mortgagee who entered into possession of the premises with the consent of the mortgage to assert a title in a comparatively short period, is invalid. The statute, however, has been sustained in at least one decision.⁹⁹

4. Actions to which statute does not apply.

When an action of redemption is not within section 46 of the Civil Practice Act it is governed by section 53, which fixes a limitation of ten years. An action for the redemption of personal property is governed by section 53, not

⁹⁴ *Calkins v. Isbell*, 20 N. Y. 147; *Miner v. Beekman*, 50 N. Y. 337; *Hubbell v. Sibley*, 50 N. Y. 468.

⁹⁵ *Schrivver v. Schriver*, 86 N. Y. 575.

Dower.—The wife's right of dower is dependent upon the seizin of her husband, and consequently it was held that she "claims under" within the meaning of section 379 of the Code of Civil Procedure. *Campbell v. Ellwanger*, 81 Hun 259, 62 St. Rep. 754, 30 N. Y. Supp. 792.

Action by wife.—A wife may, during the life time of her husband, maintain an action to redeem real interest

in which he had an equity of redemption and in which her rights have not been divested, and hence the accrual of the cause of action is not delayed until his death. *McMichael v. Russell*, 68 App. Div. 104, 74 N. Y. Supp. 212.

⁹⁶ *Becker v. McCrea*, 193 N. Y. 423; *Mooney v. Miller*, 119 Misc. 134, 195 N. Y. Supp. 437.

⁹⁷ *Mooney v. Miller*, 119 Misc. 134, 195 N. Y. Supp. 437.

⁹⁸ *Mooney v. Miller*, 119 Misc. 134, 195 N. Y. Supp. 437.

⁹⁹ *Ralston v. Fifth Ave. Bond & Mortg. Co.*, 130 Misc. 556, 224 N. Y. Supp. 44.

section 46.¹ An action for the redemption of real estate *not* in the possession of the mortgagee or one claiming under him is not controlled by section 46.² Under section 53, the action does not ordinarily accrue until the property is held adversely to the plaintiff.³

5. Laches.

Independently of the statute of limitations, equity will not take cognizance of stale demands, and relief may be refused on the ground of laches.⁴ Mere delay does not, however, bar the suit, unless it is unreasonable,⁵ or has prejudiced the rights of the defendant.

B. By whom maintained.

1. In general.

No person can invoke the aid of a court of equity for a redemption of a mortgage, except he who is entitled to the legal estate of the mortgagor or who claims a subsisting interest under him.⁶ A stranger cannot interfere. The mortgagor, if he still retains the equity of redemption, may commence the action. The right of redemption is transferrable, and an assignee thereof may maintain suit in his own name.⁷ A purchaser from the mortgagor under an executory contract of sale may redeem.⁸ The fact that the premises are in the possession of the mortgagee does not forbid a conveyance, as the mortgagee's possession is not adverse within the meaning of section 260 of the Real Property Law.⁹ One of two or more joint owners may maintain the suit.¹⁰ Upon the death of the mortgagor of personal property, the right of redemption passes to the personal representative.¹¹

1. *Treadwell v. Clark*, 73 App. Div. 473, 77 N. Y. Supp. 350.

2. *Sumner v. Sumner*, 217 App. Div. 163, 216 N. Y. Supp. 389.

3. *Treadwell v. Clark*, 190 N. Y. 51; *Treadwell v. Clark*, 73 App. Div. 473, 77 N. Y. Supp. 350.

4. *Wheeler v. Breslin*, 47 Misc. 507, 95 N. Y. Supp. 966; *Huntington v. Mather*, 2 Barb. 528; *Pratt v. Stiles*, 17 How. Pr. 211, 9 Abb. Pr. 150.

5. *Treadwell v. Clark*, 190 N. Y. 51.

6. *Grant v. Duane*, 9 Johns. 591;

Chamberlain v. Chamberlain, 44 Super. Ct. (12 J. & S.) 116.

7. *Stoddard v. Whiting*, 46 N. Y. 627; *Finn v. Lally*, 1 App. Div. 411, 72 St. Rep. 492, 37 N. Y. Supp. 437; *Moore v. Cable*, 1 Johns. Ch. 385.

8. *Lowry v. Tew*, 3 Barb. Ch. 407.

9. *Stoddard v. Whiting*, 26 N. Y. 627; *Borst v. Boyd*, 3 Sandf. Ch. 501.

10. *Brincherhoff v. Lansing*, 4 Johns. Ch. 65.

11. *King v. VanVleck*, 40 Hun 68.

2. Trustee in bankruptcy, assignee for creditors, receiver, etc.

Upon the bankruptcy of the owner of the equity of redemption, the right to maintain an action of redemption passes to his trustee in bankruptcy.¹² If an assignment for the benefit of creditors is made by the holder of the equity, his assignee may institute the suit.¹³ A receiver appointed in proceedings supplementary to execution may redeem the property of the judgment debtor.¹⁴ The equity of redemption owned by a corporation passes to its receiver.¹⁵

3. Dowress.

Upon the death of the owner of the equity of redemption his widow has a right of redemption as against a mortgagee in possession, or a purchaser upon a foreclosure to which she was not made a party.¹⁶ Moreover, she has this right during the lifetime of her husband.¹⁷ Her inchoate right of dower gives her a right to maintain an action of redemption, although the mortgage was given for a part of the purchase price of the premises.¹⁸ Ordinarily, the widow cannot secure her rights in an action to recover her dower. In any event, an action of dower cannot be maintained until the death of the husband.¹⁹ But, as the right of dower is but a partial interest in the equity of redemption, the relief to be granted is necessarily substantially different than when the redemption is sought by the owner of the entire equity.²⁰

4. Subsequent lienor.

One having a lien upon an equity of redemption may, to the extent necessary for the protection of his rights, main-

12. *Winslow v. Clark*, 47 N. Y. 261.

13. *Borst v. Boyd*, 3 Sandf. Ch.501.

14. *Bunacleugh v. Poolman*, 3 Daly 236.

15. *Casserly v. Witherbee*, 119 N. Y. 522.

16. *Sheldon v. Hoffnagle*, 51 Hun 479, 21 St. Rep. 637, 4 N. Y. Supp. 287; *Bell v. Mayor, etc.*, of N. Y., 10 Paige 49.

17. *McKenna v. Fidelity Trust Co.*, 184 N. Y. 411; *McMichael v. Russell*, 68 App. Div. 104, 74 N. Y. Supp. 212; *Ross v. Boardman*, 22 Hun 527; Tag-

gart v. Rogers, 49 Hun 265, 17 St. Rep. 320, 3 N. Y. Supp. 322; *Campbell v. Ellwanger*, 81 Hun 259, 62 St. Rep. 754, 30 N. Y. Supp. 792.

18. *Mills v. VanVoorhies*, 20 N. Y. 412; *Wheeler v. Morris*, 15 Super. Ct. (2 Bosw.) 524; *Sheldon v. Hoffnagle*, 51 Hun 478, 21 St. Rep. 637, 4 N. Y. Supp. 287; *Bell v. Mayor, etc.*, of N. Y., 10 Paige 49; *Wheeler v. Morris*, 15 Super. Ct. (2 Bosw.) 524.

19. *McMichael v. Russell*, 68 App. Div. 104, 74 N. Y. Supp. 212.

20. See, *infra*, II-6, Relief Granted.

tain an action of redemption.²¹ Thus, as against a prior mortgagee entering into possession of the premises or foreclosing his mortgage without bringing a subsequent lienor into court, the latter may redeem.²² A subsequent mortgagee under such circumstances may maintain an action of redemption.²³ An assignee of the subsequent mortgage, if the assignment has been duly recorded, may institute the proceedings.²⁴ Or the subsequent mortgagee can maintain an action for the foreclosure of his mortgage, and the rights of the parties can be determined in such action.²⁵

A judgment creditor of the owner of the equity, if his lien has not been divested, may maintain an action of redemption.²⁶ If he was not a party to a foreclosure suit

21. An incumbrancer, *pendente lite*, need not be made a party to a suit for the foreclosure of a mortgage; and he is not entitled to redeem, unless under special circumstances; as where he became a judgment creditor after the commencement of the suit, but before the decree, and the purchaser at the master's sale had previous notice of the judgment, and by a previous engagement with the mortgagor, obtained from him an order for the surplus moneys, which was accepted by the master. *Cook v. Maucius*, 5 Johns. Ch. 89.

22. *Gage v. Brewster*, 31 N. Y. 218; *Naylor v. Colville*, 20 App. Div. 581, 47 N. Y. Supp. 267; *Shearer v. Field*, 6 Misc. 189, 27 N. Y. Supp. 29; *Ralston v. Fifth Ave. Bond & Mortg. Co.*, 130 Misc. 556, 224 N. Y. Supp. 44; *Wetmore v. Roberts*, 10 How. Pr. 51.

23. *Gage v. Brewster*, 31 N. Y. 218; *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126.

24. *Naylor v. Colville*, 20 App. Div. 581, 47 N. Y. Supp. 267; *Wetmore v. Roberts*, 10 How. Pr. 51; *Bigelow v. Davol*, 62 Hun 245, 16 N. Y. Supp. 646.

25. *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126; *Wetmore v. Roberts*, 10 How. Pr. 51; *Bigelow v. Davol*, 62 Hun 245, 16 N. Y. Supp. 646.

26. *Chase v. Peck*, 21 N. Y. 581;

Augur v. Winslow, Clarke 258; *Stoker v. Cogswell*, 25 How. Pr. 267; *Benedict v. Gilman*, 4 Paige 58; *Van Buren v. Olmstead*, 5 Paige 9.

The assignee of a judgment, who has obtained an assignment that was intended and understood by him and his assignor to be given as a power of attorney, to collect the judgment in the name and for the benefit of the plaintiff and assignor, or for the purpose of enabling said assignee to collect the judgment for his assignor, has no vested rights or interest in the judgment other than that of agent or trustee of the plaintiff, his assignor. Although such assignee has sold real estate and obtained a sheriff's deed thereof, he is not entitled to be made a party to an action for a foreclosure of a mortgage on said premises as a judgment creditor or purchaser of the premises subsequent to the record of the mortgage. Nor can he maintain an action to redeem, because he was not made a party to the foreclosure action, and if he was made a party thereto and foreclosed, his assignee, under these facts, was foreclosed also, and cannot maintain an action in equity to redeem from the foreclosure. He has no equities in the premises for the consideration of the court. *McKee v. Murphy*, 34 Super. Ct. (2 J. & S.) 261.

brought by a prior mortgagee, his right continues, and a redemption may be accomplished to the extent necessary for the protection of his interests.²⁷ Or, he may sell the equity of redemption under an execution, and the purchaser may sue for redemption.²⁸ Or, he may maintain supplementary proceedings against the judgment debtor which may result in the appointment of a receiver having authority to redeem.²⁹

C. Against whom maintained.

The suit may be maintained against a mortgagee in possession or his successors in interest.³⁰ If he has conveyed his interest in the premises, his grantee as a general rule is a necessary party.³¹ A lessee of the premises may be a necessary party defendant.³² The original mortgagee may not be a necessary party if he has assigned his entire interest in the premises, but he may be a proper party.³³ All persons entitled to redeem from a mortgage must be made parties to an action to redeem.³⁴

A title insurance company which has insured a title derived under a sale on foreclosure has no such interest in the property as will entitle it to be made a party defendant to an action to redeem the land from the mortgage which was foreclosed. A motion to be made a party defendant should not be granted where the moving party has a fair opportunity to protect its interest without being a defendant.³⁵

Leasehold.—"It is settled that a judgment creditor may file a bill to redeem leasehold property mortgaged by his debtor, provided he has issued an execution at law." *Quin v. Brittain*, Hoff. Ch. 353.

27. *Brainard v. Cooper*, 10 N. Y. 356; *Belden v. Slade*, 26 Hun 635; *Benedict v. Gilman*, 4 Paige 58.

28. *Winebrener v. Johnson*, 7 Abb. Pr. N. S. 202.

Chattel mortgage.—Until a chattel mortgage becomes absolute, by the non-performance of the conditions of the mortgage, the mortgagor has such an interest in the chattels mortgaged, as is liable to levy and sale on execution; and the purchaser at the sale

on execution takes the property subject to the mortgage, and acquires with it the right to redeem it by the payment of the amount due on the mortgage. *Bank of Lansingburgh v. Crary*, 1 Barb. 542.

29. *Bunacleugh v. Poolman*, 3 Daly 236.

30. *Winslow v. Clark*, 47 N. Y. 261.

31. *Hickock v. Scribner*, 3 Johns. Cas. 311.

32. *Dias v. Merle*, 4 Paige 259.

33. *Walcott v. Sullivan*, 1 Edw. Ch. 399, affirmed, 6 Paige 117.

34. *Russ v. Stratton*, 11 Misc. 565, 66 St. Rep. 96, 32 N. Y. Supp. 767.

35. *Russ v. Stratton*, 8 Misc. 6, 59 St. Rep. 384, 23 N. Y. Supp. 392.

D. Complaint.**1. In general.**

The complaint must state the facts showing the plaintiff's right of redemption. It is not necessary to state that the plaintiff has prior to the commencement of the suit tendered the sum due to the defendant, as a prior tender is not a necessary element of the cause of action.³⁶ If, however, the complaint does not contain an allegation of tender, some of the earlier cases hold that it should contain an offer on the part of the plaintiff to pay such sum as may be due to the defendant or may be equitably required to effect the redemption,³⁷ but the later cases take the position such an allegation is a useless formality and is not indispensable.³⁸

2. Form of complaint to redeem from chattel mortgage.)³⁹

(Title.)

The plaintiff, by this his complaint, respectfully shows to the Court and states the following as a cause of action against the defendants above-named:

First. That on the 9th day of June, 1887, a judgment was duly made and entered in the Clerk's Office of Essex Co., N. Y., in an action in the Supreme Court, Essex Co., wherein J. E. Slayback was plaintiff and The Port Henry Steel and Iron Company, Limited, was defendant, sequestrating the property of said defendant and appointing the plaintiff herein permanent receiver thereof with all the powers and duties provided by statute in such cases.

That said plaintiff immediately after notice of such appointment took the oath of office, gave the bond and had the same approved as provided for by the said judgment appointing him, caused the same to be filed in the Clerk's Office of Essex Co., and at once entered upon the discharge of his duties as such receiver and is still acting as receiver for said corporation and discharging the duties with such trust and employment.

Second. That said defendants are now and were at the time and times hereinafter mentioned co-partners engaged in business at Port Henry, Essex Co., New York, and at other places, under the firm name and style of Witherbee, Sherman & Co.

Third. That in and during the year 1886 and for some time prior and subsequent thereto, The Port Henry Steel and Iron Company (being a domestic corporation and organized under the laws of the State of New York) was engaged in business in Essex Co.,

36. See, *supra*, I-C, Demand or tender before suit.

37. *Silbee v. Smith*, 60 Barb. 372, 41 How. Pr. 418; *Beekman v. Frost*, 18 Johns. 544; *Brush v. Evans*, 53 Super. Ct. (21 J. & S.) 523.

38. *Beach v. Cooke*, 28 N. Y. 508; *Cassery v. Witherbee*, 119 N. Y. 522; *Marvin v. Prentice*, 49 How. Pr. 385.

39. This form is adapted from that used in *Cassery v. Witherbee*, 119 N. Y. 522.

N. Y., having its principal office at Port Henry in said county. That while so engaged in business as aforesaid the said corporation in and during the year 1886 became indebted to the defendant herein; that during the month of August, 1886, such indebtedness was liquidated between the said corporation and the defendants in this action, and to secure the same and such indebtedness as might accrue or become due on or before the first day of January, 1887, the said corporation in due form of law, on the 10th day of August, 1886, executed and delivered to the defendants herein chattel mortgages whereby it sold, assigned and transferred to the said defendants all its right, title and interest in and to all buildings, machinery, erections, tools, fixtures, and appliances, hoisting engine and all machinery and apparatus connected therewith placed by it upon the premises known as the Cedar Point Furnace and land adjacent, together with all scraps or scrap iron owned by it and in its possession at Port Henry, N. Y.

That when said mortgages were given the total indebtedness existing and owing from said corporation to said defendants was \$17,086.84, and said amount was mentioned and stated in said mortgages as the consideration therefor.

That subsequently to the 10th day of August, 1886, and on or about the 2nd day of September, 1886, the said defendants caused said mortgages to be filed in the Clerk's office of the town of Moriah, Essex Co., the same being the town wherein said property was located.

That the debt for which said mortgages were given as security, by the terms and conditions of said mortgages, became due and payable on or before the 1st day of January, 1887.

Fourth. And said plaintiff, by this his complaint, and upon information and belief, further shows and alleges that on or about the 10th day of January, 1887, the defendants herein took actual possession of the property described in said mortgages and thereafter caused a sale to be made of all the property covered by said mortgages at auction and on the day of such sale bid in the property so covered by said mortgages at and for the sum of \$1,000. That said sale was irregularly made and unlawfully conducted; that no portion of the personal property was visible, in sight or in view of the person or persons attending such sale; that all the personal property described in said mortgages and covered thereby was put up for sale in a lump and sold together at the request of said defendants, although said defendants well knew that said articles of personal property could be sold separately and greater sums realized therefor if sold in parcels; that none of the officers of said corporation were present at said sale.

That ever since the said property was so taken by defendants and by them sold as aforesaid they have claimed to be the legal owners thereof and still hold and retain the same, except that since the said sale they have sold some portion thereof, realizing from such sale between the sum of ten and fifteen thousand dollars.

That at the time the said property was so taken by defendants as aforesaid and by them thereafter sold the value of the same was

about sixty thousand dollars, and the indebtedness due to said defendants from said corporation on said mortgages did not exceed the sum of twenty thousand dollars, and there was no other indebtedness existing, due or owing from said corporation to said defendants.

And said plaintiff, by this his complaint, further alleges upon his information and belief that the whole amount of the capital stock of said company was paid in in full and a certificate of that fact in due form of law has been duly filed in the office of the Secretary of State of the State of New York, as required by the statute in such case made and provided; that there are numerous persons claiming to be creditors of the said company besides the said J. E. Slayback and the defendants herein; that the said defendants claim to be creditors of said company for the balance of the indebtedness secured by said mortgages after deducting the said sum of one thousand dollars, amounting to \$18,281.59, with interest from August 10th, 1886; that there is not enough remaining property of the said company sufficient in amount to pay such claims and creditors in full.

Wherefore, by reason of the premises, the plaintiff demands the judgment and decree of this court that said defendants account to the plaintiff herein for the true and full value of the property so taken and sold by them at the time the same was so taken, retained and sold as hereinbefore stated, and that the value thereof so to be ascertained be applied in payment and extinguishment of the debt secured by said mortgages referred to, and that plaintiff herein have judgment against said defendants for the balance, together with such other and further relief in the premises as may be just and equitable with the costs and disbursements of this action.

3. Another form of complaint to redeem from chattel mortgage.⁴⁰

(Title.)

The complaint of plaintiff, by Wm. F. McRae, his attorney:

I. That heretofore one Albert E. Hughes, lately deceased, was at the time of his death and for many years previous thereto, the owner and proprietor of a certain valuable medical remedy, known as "Albert's Rheumatic and Gout Remedy," and which had a large sale in this and foreign countries.

II. That said Albert E. Hughes departed this life on or about 28th January, 1897, leaving a last will and testament which was duly admitted to probate by the Hon. Frank T. Fitzgerald, a Surrogate of the City and County of New York, on the 15th day of February, 1897.

III. That letters of administration of the goods, chattels and property of the said deceased, with the will annexed was duly

⁴⁰. This form is adapted from that used in *Hughes v. Harlam*, 166 N. Y. 427.

granted by said surrogate to the plaintiff on the 24th day of February, 1897, and he duly qualified as such administrator.

IV. That the defendant has wrongfully become possessed of the store and goods of the deceased, and of a copy or pretended copy of the formula or recipe for the making of said "Albert's Rheumatic and Gout Remedy," and wrongfully claims the sole right to manufacture and sell said remedy, and has circulated, and continues to circulate, a printed notice or circular as follows:

"To the Wholesale Drug Trade:

"This is to inform you that I have succeeded to the sole right to manufacture and sell

" 'Albert's Rheumatic and Gout Remedy,'

formerly manufactured and sold by Albert E. Hughes, now deceased. The formula is that used by the late Albert E. Hughes.

"I have retained the old headquarters at No. 430 Hudson street, where I will be pleased to receive and fill all orders.

"Very respectfully,

"THE HARLAM DRUG CO.,

"NED HARLAM, Prop."

That said notice is intended to prevent, and will prevent, plaintiff from having the profits and benefit of said remedy, and that all whereof is to the great injury, wrong and damage of plaintiff and the estate and rights of said deceased.

V. That defendant's pretended claim of title, as plaintiff is informed and believes, is a paper writing by way of chattel mortgage or lien, obtained from the deceased a few days before his death, on an alleged indebtedness of \$3,000, and that said paper writing was obtained by the duress, fraud and undue influence of defendant, and did not express the intentions of the deceased.

VI. That plaintiff is ready and willing to pay, and has duly tendered to defendant any sum due from the deceased to him.

Wherefore, plaintiff demands judgment:

1. That defendant, his agents, employees and servants, as well as the said pretended "Harlam Drug Company," be restrained from using or interfering with said formula or any copy or imitation thereof; or of making, vending or disposing of said remedy to any person, or from printing or circulating the said printed circular, or any such circular interfering with plaintiff's use thereof.

2. That defendant deliver up said formula, or any copy or imitation thereof in his possession or control.

3. That there be an accounting as to any sales by defendant, or any person on his behalf, of said remedy and the profits thereof, and such other relief as may be just.

4. That plaintiff have the costs of this action.

4. Form of complaint in action by wife.⁴¹

(Title.)

The plaintiff for her cause of action against the defendants, by Clinton & Thomas, her attorneys, alleges:

I. That at all times hereinafter mentioned, the plaintiff was the lawful wedded wife of one Joseph Mackenna, and as such wife, during her husband's lifetime, had an inchoate right of dower in all real property of which he was seized and possessed.

II. That heretofore and on or about the 21st day of February, 1896, the aforesaid Joseph Mackenna became the owner in fee of those certain premises conveyed to him by Charles F. Mackenna and Mary C. Mackenna, his wife, by deed dated February 20th, 1896 and recorded in the office of the Clerk of Niagara County in Liber 242 of Deeds, at page 356, and described as follows:

(Here follows description.)

That thereupon said Joseph Mackenna became possessed of said premises and this plaintiff, as the wife of said Joseph Mackenna, became entitled to an inchoate right of dower therein.

III. That on or about the 3d day of December, 1895, one Charles F. Mackenna, being then the owner in fee of the premises above described, executed and delivered to one George M. Porter, the defendant herein, a bond bearing date on that day in the penal sum of \$47,050.00 with the condition thereunder written, that if the obligor in the said bond named, his heirs, executors or administrators should pay or cause to be paid to the obligee in the said bond named, his executors, administrators or assigns, the sum of \$23,525.00 at the expiration of five years from the date thereof, with interest, then the said bond to be void, otherwise to be and remain in full force. And the said Charles F. Mackenna and Mary C. Mackenna, his wife, to secure the payment of the principal and interest mentioned in the condition of said bond, did at the same time execute under their hands and seals and delivered to said George M. Porter a mortgage bearing even date with the said bond, whereby they mortgaged unto the said George M. Porter, in full, all of the premises above described. That said premises so mortgaged were the same premises subsequently conveyed by Charles F. Mackenna and his wife to Joseph Mackenna as above alleged.

IV. That thereafter, said bond and mortgage was assigned to the Fidelity Trust & Guaranty Company, of Buffalo, a domestic banking corporation created, organized and existing under and by virtue of the laws of the State of New York, having its office and place of business in the City of Buffalo. That sometime in the month of April, 1901, the name of said Company was changed, by authority of law, to "The Fidelity Trust Company, of Buffalo."

V. That thereafter said tract of land was subdivided into one hundred and seventy-two lots by Porter & Jones, Civil Engineers, January 19th, 1896, and a map or plan of said tract, therein called

⁴¹. This form is adapted from that used in *McKenna v. Fidelity Trust Co.*, 184 N. Y. 411.

Aluminum Park, was filed in the office of the Clerk of Niagara in Tin Tube 15, on August 10th, 1896.

VI. That subsequent to the execution and delivery of said bond and mortgage, there was released from the lien, operation and effect of said mortgage, the three following described parts of said premises:

Lot number thirty-four (34) and the west fifteen (15) feet of lot number thirty-five (35), on the north side of Mackenna Avenue, etc., etc.

Also all that tract or parcel of land situate in the City of Niagara Falls, County of Niagara and State of New York, bounded and described as follows: viz:

(Here follows description.)

Also lots 147, 148, 149, 150 and 151 on Twenty-second street as shown on plan or map of Aluminum Park, in the City of Niagara Falls, N. Y., referred to above.

VII. That on or about the 18th day of December, 1899, an action was commenced in the Supreme Court of this State, in the County of Niagara, by the Fidelity Trust & Guaranty Company, of Buffalo, against Charles F. Mackenna, Mary C. Mackenna, Joseph Mackenna, Burton A. Preish, John S. Lambing, Elliott M. Bonnell, and Solon S. Pomroy, by the service of a summons on all of the defendants therein, for the purpose of foreclosing the mortgage above-mentioned. That such proceedings were thereupon had, that on the 22d day of June, 1900, a judgment was entered in the Clerk's office of Niagara County, adjudging that the mortgaged premises described above, excepting those three certain parts released, be sold at public auction to satisfy and discharge the mortgage debt of \$20,758.69, and the plaintiff's costs of \$175.89, adjudged to be due on that day. That all of said property described herein, excepting the three parcels released, were thereupon and on the 18th day of July, 1900, sold for the sum of \$10,000.00, to The Fidelity Trust & Guaranty Company of Buffalo, N. Y., which company thereafter entered into the possession of said premises, and into the receipt of the rents and profits thereof, and has ever since continued to be in such possession and receipt.

VIII. That at the time said action was commenced, the judgment procured and the sale made, Joseph Mackenna was the sole owner of said premises, and that as the wife of said Mackenna, this plaintiff had an inchoate right of dower therein. That this plaintiff was not made a party to said action and her interest in said property still exists.

IX. That the plaintiff before the commencement of this action tendered and offered to pay The Fidelity Trust Company of Buffalo, the amount due it on said foreclosure sale above-mentioned, with interest to the date of said offer, and tendered and offered to pay all taxes paid by said Fidelity Trust Company of Buffalo, with interest thereon to the date of said offer, and also offered to have drawn a deed of said premises, and to furnish the services of a notary public upon the execution of a deed, if said The Fidelity Trust Company of Buffalo would execute a deed to this plaintiff.

but said The Fidelity Trust Company of Buffalo refused to do so.

X. That this plaintiff does hereby tender and offer to pay into court, for the benefit of said The Fidelity Trust Company of Buffalo, the amount due it with interest on said foreclosure sale and all taxes paid by said The Fidelity Trust Company of Buffalo, with interest.

XI. Upon information and belief the defendant George M. Porter, and ——— Porter, his wife, whose first name is unknown to this plaintiff, have or claim to have some interest in or lien upon the said premises, or some part thereof.

Wherefore, the plaintiff demands that an account may be taken of what is due to the said defendant, The Fidelity Trust Company of Buffalo, for principal and interest, and for taxes paid and interest thereon; and that an account may also be taken of the rents and profits of the said premises which have been possessed and received by said defendant, or by its order, or for its use; and that the plaintiff may be at liberty to redeem said premises upon payment of whatever may be due said The Fidelity Trust Company of Buffalo, and that said Company, upon payment thereof, may be adjudged to execute and deliver a deed and possession of said premises to the plaintiff, or to such person as she shall direct, free from all incumbrances, and for such further or other relief as to the court may seem just, together with the costs of this action.

5. Form of complaint in action to declare a deed as a mortgage.⁴²

(Title.)

The plaintiff herein, appearing by Simon G. Sheehan, her attorney, shows to this Court:

I. That on the fourteenth day of August, 1878, this plaintiff was seized in fee simple and was in possession of the following premises, to wit:

(Here follows description.)

Said premises then being of the value of \$10,000 and upwards.

II. That on said fourteenth day of August, 1878, the plaintiff was indebted to one Owen Byrne in the sum of two thousand and eight hundred and seventy-five 16/100 dollars, with interest thereon. That the plaintiff was further indebted to the said Owen Byrne in the sum of one hundred and fifty dollars paid by said Byrne to one Timothy F. Neville for the benefit and on account of this plaintiff in discharge of certain assessments, water rents and taxes upon the premises hereinbefore described.

III. That thereupon and upon said day this plaintiff, at the special instance and request of said Owen Byrne, and in pursuance of an arrangement made with him to secure the payment of the above-mentioned indebtedness, executed and delivered to the said Owen Byrne a deed in form of the aforesaid premises, which said

⁴². This form is adapted from that used in *Mooney v. Byrne*, 163 N. Y.

deed is recorded in the office of the Register of the City and County of New York, in Liber 1470 of Conveyances, at page 50, and which deed is hereby referred to and made part of this complaint. That the said deed was given as security as aforesaid and for no other purpose. And the said Owen Byrne simultaneously executed and delivered to this plaintiff a certain defeasance, or instrument in writing, whereby, in consideration of the securing to him of the payment of the said indebtedness as aforesaid, he covenanted and agreed to restore and reconvey to the plaintiff the said premises, upon the payment to him, within one year) of the aforesaid indebtedness, with interest thereupon. That said instrument is hereby referred to and made a part of this complaint, a copy thereof being annexed hereto and marked Exhibit A.

IV. That thereafter, as this plaintiff is informed and believes, the said Owen Byrne entered into and took possession of the said premises, and the said Owen Byrne his representatives or assigns, have ever since been in possession of said premises and have received to their own use the rents and profits thereof.

V. That if said Owen Byrne or his representatives have made any conveyance or pretended conveyance of said premises, such conveyance was made without the knowledge or consent of this plaintiff.

VI. That on the 11th day of January, 1889, the said Owen Byrne died. That on the 12th day of February, 1889, the last will and testament of said Byrne was duly admitted to probate in the County of Kings, which said will is recorded in the office of the Surrogate of said county, in Liber 135 of Wills, at page 484, and which will is hereby referred to and made a part of this complaint. That on the 12th day of February, 1899, Daniel J. O'Connor duly qualified as sole executor under and by virtue of said will. That by the said will all the property, both real and personal, of the said Owen Byrne was devised and bequeathed to the defendants herein, and that said property was accordingly duly delivered to and distributed among them according to the manner and upon the several trusts directed by the terms of said will.

That on the 26th day of May, 1890, the said Daniel J. O'Connor rendered a final account of his proceedings as sole executor under said will and on the same day was duly discharged as such executor. That said Daniel J. O'Connor was duly appointed by said will trustee of certain trusts therein created, and that said O'Connor has continued to be and now is such trustee.

VII. That the rents and profits of the said premises now amount to and are much more than the principal and interest due from this plaintiff upon the aforesaid indebtedness and the taxes and assessments and all other sums chargeable to her.

VIII. That the plaintiff has made demand for an accounting and that she be allowed to redeem said premises, and that the said premises be reconveyed and delivered up to her upon payment by her of all the sums due from her as aforesaid, which sums she has offered and hereby offers to pay, but the defendants will not consent thereto.

IX. That the defendants The Roman Catholic Orphan Asylum in the City of New York, The Roman Catholic Orphan Asylum Society in the City of Brooklyn, in the County of Kings, are domestic corporations, created and existing under and by virtue of the laws of the State of New York; that the defendant St. Joseph's Roman Catholic Orphan Asylum in the City of Philadelphia is a foreign corporation, created and existing under and by virtue of the laws of the State of Pennsylvania.

Wherefore, this plaintiff demands judgment that an account be taken of the amount now due from her upon the aforesaid indebtedness for principal and interest. And that this plaintiff may be at liberty to redeem said mortgaged premises upon payment of whatever may upon such accounting be found due, which this plaintiff hereby offers to pay.

And that upon such payment the defendants, or such of them as may be necessary thereto, execute and deliver to this plaintiff warranty deeds, with the usual covenants sufficient to convey to her the said premises.

And that if said Owen Byrne, or his representatives, or the said defendants or any of them, have conveyed the said premises to a *bona fide* purchaser for value, or if for any cause a reconveyance cannot be had, then that due compensation for the value of said premises be made to this plaintiff by the defendants and each of them in proportion to the share of the assets of said Owen Byrne received by them and up to the amount of the same, whether said shares were given in trust or otherwise.

And that the plaintiff have such further relief as to this court may seem just, together with the costs of this action.

(Attach exhibits.)

E. Venue.

An action for the redemption of an interest in real estate is within section 183 of the Civil Practice Act, and is triable in the county where the property is situated.⁴³ An action for the redemption of personal property is transitory, and the venue may properly be laid in a county where one of the parties reside.

F. Trial of issues.

An action of redemption is purely of equitable cognizance, and hence neither party is entitled to a jury trial of the issues as a matter of right.⁴⁴

43. *Bush v. Treadwell*, 11 Abb. Pr. N. S. 27. *Contra*, *Hubbell v. Sibley*, 4 Abb. Pr. N. S. 403.

44. *Maple Holding Corp. v. Weichman-Harte Realty Corp.*, 130 Misc. 720, 224 N. Y. Supp. 348.

G. Relief granted.**1. In general.**

The judgment ordinarily made in an action of redemption adjudicates that the plaintiff is entitled to redeem, fixes the amount he shall pay as a condition of redemption, directs the payment of such sum to the defendant within a certain time, requires the defendant to surrender the premises to the plaintiff on the payment thereof, provides that if the plaintiff fails to make such payment his complaint shall stand dismissed, and makes directions as to costs.⁴⁵ The plaintiff may be awarded such incidental relief as may be necessary to accomplish the redemption.⁴⁶ He will receive such relief as is consistent with the facts proved and embraced within the issues.⁴⁷ The court will not make a general adjustment of the equities between the parties, but will determine only such as are directly connected with the land in question.⁴⁸

2. Accounting between parties.

The items which the defendant is entitled to charge against the plaintiff and the credits which should be allowed to the plaintiff frequently require an accounting between the parties. Such an accounting may be directed.⁴⁹ The practice is sometimes followed of rendering an interlocutory judgment adjudicating the right of redemption and directing an accounting before a referee.⁵⁰ Final judgment is thereafter rendered on the referee's report.

3. Rents and profits.

A defendant who has been in possession of property is required to account for the rents and profits thereof.⁵¹ The

45. Chattel mortgages.—See, Griffin & Curtis on Chattel Mortgages and Conditional Sales, p. 132, as to the relief granted in an action to redeem mortgaged goods.

46. Casserly v. Witherbee, 119 N. Y. 522; Clark v. Levy, 130 App. Div. 389, 114 N. Y. Supp. 890.

47. Marvin v. Prentice, 49 How. Pr. 385.

48. Morris v. Budlong, 78 N. Y. 543; McKenna v. Fidelity Trust Co., 184 N. Y. 411.

49. Morris v. Budlong, 73 N. Y. 543; Casserly v. Witherbee, 119 N. Y. 522; Ross v. Boardman, 22 Hun 527.

50. Melenky v. Melen, 206 App. Div. 46, 200 N. Y. Supp. 730; Massari v. Giradi, 119 Misc. 607, 197 N. Y. Supp. 551; Quin v. Brittain, Hoff. Ch. 353.

Appeal.—There is no appeal to the Court of Appeals as a matter of right from the interlocutory judgment. Melenky v. Melen, 206 App. Div. 46, 200 N. Y. Supp. 730.

51. Mickles v. Dillaye, 17 N. Y. 80;

rents and profits do not include those which have been received as a result of improvements, if he is not allowed the cost or value of the improvements.⁵² If the property consists of stocks or bonds, the defendant may be charged with the interest or dividends received by him.⁵³ A renewal of a lease or other benefit received by the defendant by reason of his possession accrues to the benefit of the plaintiff.⁵⁴ If the property has been personally used by the defendant, he is chargeable with the value of such use.⁵⁵ Rents and profits which the defendant should have received, but which were lost by wilful neglect or gross negligence may be credited to the plaintiff, but otherwise the defendant will not be burdened except as to rents and profits actually received.⁵⁶

If the property or a part thereof has been sold by the defendant under such circumstances that it cannot be recovered by the plaintiff, the defendant may be charged with the proceeds,⁵⁷ or, at the election of the plaintiff when the transfer was wrongful, with the value of the property at the time the

Morris v. Burlong, 78 N. Y. 543; *Thompson v. Loan Comm'rs of Otsego*, 79 N. Y. 54; *Dempsey v. Johnson*, 142 App. Div. 226, 126 N. Y. Supp. 944; *Shearer v. Field*, 6 Misc. 139, 27 N. Y. Supp. 29; *Calkins v. Calkins*, 3 Barb. 305; *Ross v. Boardman*, 22 Hun 527; *Bell v. Mayor, etc., of N. Y.*, 10 Paige 49.

Mortgagee as tenant of mortgagor.—Although a mortgagee is tenant to the mortgagor of the premises mortgaged, yet the right to set off rents against the principal or interest of the mortgage debt, does not necessarily attach as an inherent quality of the contract, so as to prevent the assignment of the mortgage, except subject to the right, on a bill to redeem. But, while a mortgagee holds the mortgage, and is also tenant, so long the mortgagor has a right to have the rents applied to the keeping down of the interest. If a mortgagee, in possession, is allowed to retain it after assigning his mortgage with notice, the mortgagor cannot charge the subsequently accruing

rents against the assignee. His remedy is by eviction or compelling an occupation rent. *Wolcott v. Sullivan*, 1 Edw. Ch. 399, affirmed, 6 Paige 117.

Compound interest on the sums charged against a defendant is not permitted. *Shelly v. Cody*, 167 N. Y. 165.

^{52.} *Calkins v. Calkins*, 3 Barb. 305; *Moore v. Cable*, 1 Johns. Ch. 385; *Bell v. Mayor, etc., of N. Y.*, 10 Paige 49.

^{53.} *Treadwell v. Clark*, 190 N. Y. 51.

⁵⁴ *Holridge v. Gillespie*, 2 Johns. Ch. 30; *Slee v. Manhattan Co.*, 1 Paige 48.

^{55.} *Cutler v. James Goold Co.*, 43 Hun 516, 7 St. Rep. 106, 26 Week. Dig. 342; *Van Buren v. Olmstead*, 5 Paige 9.

^{56.} *Morris v. Budlong*, 78 N. Y. 543; *Wetmore v. Roberts*, 10 How. Pr. 51.

^{57.} *Meehan v. Forrester*, 52 N. Y. 277; *Morris v. Budlong*, 78 N. Y. 543; *Casserly v. Witherbee*, 119 N. Y. 522; *Mooney v. Byrne*, 163 N. Y. 86; *Richardson v. Beaber*, 62 Barb. 542, 115

right of redemption is established.⁵⁸ If the defendant has taken other property in part payment on a sale of the premises in question, the value of the property received by him may be shown.⁵⁹

4. Costs and charges of defendant.

As a condition of the redemption, the plaintiff will be required to pay the debt with interest,⁶⁰ and also all necessary charges in the care of the property, such as taxes and assessments,⁶¹ ordinary repairs,⁶² and the like. Other expenses expressly stipulated by an agreement between the parties may be allowed to the defendant.⁶³ But debts not relating to the particular property in controversy are not considered.⁶⁴

A mortgagor cannot redeem without paying what is really due, and when a mortgagee buys in an incumbrance, he should be allowed as against the mortgagor all that is due upon it, though he bought it for less. But it is otherwise if the heir or trustee of a mortgagor buys in an incumbrance, as against subsequent incumbrancers and creditors, in which case he can only be allowed what he has paid for an incumbrance.⁶⁵

As against a purchaser at a foreclosure sale where the redemption is sought by a lienor who was not a party to the foreclosure proceedings, the plaintiff will not ordinarily be required to pay the costs of such foreclosure.⁶⁶ If, however, the foreclosure is not void, but is merely voidable, as

N. Y. Supp. 821; *Brockway v. Wells*, 1 Paige, 617; *Borst v. Boyd*, 3 Sandf. Ch. 501.

58. *Meehan v. Forrester*, 52 N. Y. 277.

59. *Haussknecht v. Smith*, 11 App. Div. 185, 42 N. Y. Supp. 611, affirmed without opinion, 161 N. Y. 663.

60. *Gage v. Brewster*, 31 N. Y. 218; *Morris v. Budlong*, 78 N. Y. 543; *Shearer v. Field*, 6 Misc. 189, 27 N. Y. Supp. 29; *Richardson v. Beaber*, 62 Misc. 542, 115 N. Y. Supp. 821; *Parker v. Austin*, 15 Week. Dig. 474.

61. *Miner v. Beekman*, 50 N. Y. 337; *Richardson v. Beaber*, 62 Misc. 542,

115 N. Y. Supp. 821; *Calkins v. Calkins*, 3 Barb. 305.

62. *Faulkner v. Cody*, 45 Misc. 64, 91 N. Y. Supp. 633; *Calkins v. Calkins*, 3 Barb. 305; *Quin v. Brittain*, Hoff. Ch. 353; *Wetmore v. Roberts*, 10 How. Pr. 51.

63. *Morris v. Budlong*, 78 N. Y. 543; *Halliday v. McGraw*, 231 N. Y. 382.

64. *Morris v. Budlong*, 78 N. Y. 543; *Burnet v. Denniston*, 5 Johns. Ch. 35.

65. *Belden v. Slade*, 26 Hun 635.

66. *Gage v. Brewster*, 31 N. Y. 218; *Belden v. Slade*, 26 Hun 635; *Benedict v. Gilman*, 4 Paige 58; *Vroom v. Dittmas*, 4 Paige 526.

against the plaintiff, such costs may be charged against him.⁶⁷

5. Improvements by defendant.

While in equity the mortgagee is to be allowed for all repairs necessary for the preservation of the property, he is not allowed for improvements made without the consent of the owner of the equity and with knowledge of the right of redemption.⁶⁸ Especially is this so when the improvements are of such a nature as may embarrass the owner's right or ability to redeem.⁶⁹ The principle is strictly enforced if the defendant has wrongfully entered the premises.⁷⁰ On the other hand, if a defendant has entered into possession of the premises in good faith believing that his title thereto was absolute, the court may allow him the value of improvements he has made to the premises, although they exceed the rents and profits received by him.⁷¹

6. Time for redemption.

While it has been held in a recent case that the court cannot fix a time limitation for redemption,⁷² it has always been the practice to require the plaintiff to pay within a specified time, usually from three to six months, the amount to which the defendant is entitled, with interest from the date of the decree to the date of payment.⁷³ The decree usually provides that, if the sum is not paid within the prescribed time, the action shall be dismissed.⁷⁴ A dismissal under such circumstances bars the equity of redemption and operates a strict foreclosure of the right of redemption.⁷⁵

67. *Clark v. Levy*, 130 App. Div. 389, 114 N. Y. Supp. 890.

68. *Mickles v. Dillaye*, 17 N. Y. 80; *Faulkner v. Cody*, 45 Misc. 64, 91 N. Y. Supp. 633; *Calkins v. Calkins*, 3 Barb. 305; *Quin v. Brittain*, Hoff. Ch. 353; *Moore v. Cable*, 1 Johns. Ch. 355.

69. *Calkins v. Calkins*, 3 Barb. 305.

70. *Shelley v. Cody*, 187 N. Y. 166; *Faulkner v. Cody*, 45 Misc. 64, 91 N. Y. Supp. 633.

71. *Mickles v. Dillaye*, 17 N. Y. 80; *Miner v. Beekman*, 50 N. Y. 337; *Shearer v. Field*, 6 Misc. 189, 27 N. Y. Supp. 29; *Wetmore v. Roberts*, 10

How. Pr. 51; *Benedict v. Gilman*, 4 Paige 58.

72. *Thompson v. Lewis*, 182 App. Div. 556, 169 N. Y. Supp. 501.

73. *Perine v. Dunn*, 4 Johns. Ch. 140; *Waller v. Harris*, 7 Paige 167, affirmed, 20 Wend. 555; *Dunham v. Jackson*, 6 Wend. 22.

74. *Quin v. Brittain*, Hoff. Ch. 353; *Perine v. Dunn*, 4 Johns. Ch. 140.

75. *Caserly v. Witherbee*, 119 N. Y. 522; *Sherwood v. Hooker*, 1 Barb. Ch. 650; *Quin v. Brittain*, Hoff. Ch. 353; *Perine v. Dunn*, 4 Johns. Ch. 140; *Dunham v. Jackson*, 6 Wend. 22.

7. Sale of property.

An action of redemption cannot be maintained for the purpose of having a judicial sale of the property and the payment to the plaintiff of a sum of money representing his interest in the equity of redemption.⁷⁶ A plea of financial inability to pay will not avail the plaintiff.⁷⁷ But much the same result can be accomplished by one having a mortgage on the equity of redemption, for he can maintain an action for the foreclosure of his claim, and the proceeds of the foreclosure sale can in some cases be applied in payment of the amount due the person in possession, and the excess can be applied in payment of liens on the equity of redemption.⁷⁸

8. Money judgment in lieu of redemption.

Ordinarily a money judgment in favor of the plaintiff will not be granted in an action of redemption. If, however, the defendant has prevented a redemption, reparation may be made in damages.⁷⁹ Thus, if a mortgagee of a life insurance policy receives the amount of the policy, as to the excess over the amount of the debt, the mortgagee may be treated as the debtor of the representative of the original mortgagor.⁸⁰ If the property has been transferred by the defendant so that it cannot be recovered by the defendant, the right of redemption is transferred to the proceeds and the only relief that can be granted is a direction that the defendant pay such proceeds to the plaintiff, less the amount of the debt and such charges as the defendant can properly charge against the plaintiff.⁸¹ If only a part of the property has been transferred by a defendant, the court will not charge the defendant with the value of the part remaining in his possession. The defendant will not be required to take the remaining part at a valuation fixed by the court.⁸²

9. Re-conveyance to plaintiff.

Ordinarily, in the case of the redemption of mortgaged premises, it is not necessary to direct the defendant to

76. *Goldsmith v. Osborne*, 1 Edw. Ch. 560.

77. *Goldsmith v. Osborne*, 1 Edw. Ch. 560.

78. *Denton v. Ontario County Nat. Bank*, 150 N. Y. 126; *Wetmore v. Roberts*, 10 How. Pr. 51.

79. *Cartier v. Pabst Brewing Co.*, 112 App. Div. 419, 98 N. Y. Supp. 516;

Stoddard v. Denison, 38 How. Pr. 296, 7 Abb. Pr. N. S. 309, 32 Super. Ct. (2 Sweeney) 54.

80. *King v. VanVleck*, 40 Hun 68.

81. *Mooney v. Byrne*, 163 N. Y. 86; *Doty v. Norton*, 133 App. Div. 106, 117 N. Y. Supp. 793. See, *supra*, II-G-3, Rents and profits.

82. *Bragelman v. Daue*, 69 N. Y. 69.

convey the premises to the plaintiff. But, if the mortgage was in the form of an absolute deed, the judgment may direct a reconveyance, upon the payment by the plaintiff of the sum fixed by the judgment.⁸³ A general warranty deed will not be required, for all that the circumstances usually require is one which contains warranties against the acts of the grantor.⁸⁴ A conveyance to a plaintiff who had only a judgment lien on the premises will not be ordered.⁸⁵

10. Redemption of part of premises.

One who has acquired the equity of redemption to a part of the mortgaged premises has no right to redeem for that part only. On the contrary, if he seeks to redeem, he must redeem the entire mortgaged premises.⁸⁶ Special circumstances, however, as where the defendant has not acted in good faith, may induce the court to grant a redemption of less than the whole.⁸⁷ And the general rule is mainly for the benefit of the defendant, and will not be enforced where to do so would cause an injustice to him.⁸⁸

11. Relief to subsequent lienors.

One having merely a lien on the equity of redemption, although entitled to maintain a suit for redemption, is not necessarily entitled to the possession of the premises on satisfaction of the equities of the defendant in possession.⁸⁹ There may be other interests in the equity of redemption which the court should protect. The defendant at his option may be permitted to retain his possession by paying to the plaintiff the amount of his claim.⁹⁰ As against a mortgagee in possession, no other person asserting any interest in the premises, a subsequent lienor, is entitled to an assignment of the mortgage, and may thereafter assume the position of a mortgagee in possession.⁹¹ The subsequent lienor redeems the mortgage rather than the property.⁹²

83. *Morris v. Budlong*, 78 N. Y. 543;
Blazey v. McLean, 77 Hun 607, 28 N. Y. Supp. 286, 59 St. Rep. 832.

84. *Shields v. Russell*, 142 N. Y. 290.

85. *Belden v. Slade*, 26 Hun 635.

86. *Boqut v. Colburn*, 27 Barb. 230;
Dick v. Livingston, 2 How. Pr. N. S. 10; *Shearer v. Field*, 6 Misc. 189, 27 N. Y. Supp. 29.

87. *Coffin v. Parker*, 127 N. Y. 117.

88. *Shearer v. Field*, 6 Misc. 189, 27 N. Y. Supp. 29; *Boqut v. Colburn*, 27 Barb. 230.

89. *Belden v. Slade*, 26 Hun 635.

90. *Naylor v. Colville*, 20 App. Div. 581, 47 N. Y. Supp. 267.

91. *Pardee v. Van Anken*, 3 Barb. 534, 6 N. Y. Leg. Obs. 378.

92. *Pardee v. Van Anken*, 3 Barb. 534, 6 N. Y. Leg. Obs. 378.

If the holder of a mortgage is maintaining or threatening to maintain foreclosure proceedings, a junior lienor, for the protection of his claim, may compel the senior lienor to assign the mortgage.⁹³ The assignees of a term of years may, to protect their estate, redeem a mortgage covering the premises given by their lessor prior to the lease. It will make no difference if the leasehold premises consist of but a part of the lands covered by the mortgage. Upon the redemption, the redeeming party has a right to an assignment of the mortgage redeemed, and, if it be recorded, a right to require the mortgagee to acknowledge the assignment.⁹⁴

12. Relief to part owner of equity.

One of several owners of the equity of redemption may maintain the action. He may bring in his co-owners as parties and may ask them to contribute their shares toward the payment of the obligation.⁹⁵ The defendant will not ordinarily be required to release the plaintiff's share in the premises upon the payment of his proportion of the obligation.⁹⁶ Thus there are practical difficulties attending a redemption by a dowress. As between her and the other owners of the equity of redemption, she is required to pay

93. *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553; *Jenkins v. Continental Ins. Co.*, 12 How. Pr. 66. See also, *Cleveland v. Rothwell*, 54 App. Div. 14, 66 N. Y. Supp. 241.

Fourth mortgagee against second mortgagee.—Where the holder of a second and of a third mortgage upon the same premises (the latter of which has been recorded, but, with its accompanying bond, has been thereafter destroyed by fire) obtains a judgment of foreclosure upon the second mortgage, and it appears that the premises are barely sufficient to pay these two mortgages, a fourth mortgagee cannot compel the said holder to assign her judgment upon the mere payment of its amount, but will also be required to agree, in writing, to pay her the amount of the third mortgage with interest and costs, whenever she shall,

by action or other appropriate proceedings, have established her right to collect it. *Mayer v. Moore*, 29 Misc. 475, 61 N. Y. Supp. 940.

94. *Averill v. Taylor*, 8 N. Y. 44.

The lessee of premises that are subject to a mortgage, the payment of which was assumed by the grantee of the premises, is not entitled to an assignment of the bond and mortgage from the assignee of the mortgagee upon a tender of the amount due on the mortgage which is being foreclosed, unless it releases the mortgagor from his personal liability on the bond. *Schenectady Sav. Bank v. Ashton*, 205 App. Div. 781, 200 N. Y. Supp. 245.

95. *Brinkerhoff v. Lansing*, 4 Johns. Ch. 65; *Coffin v. Parker*, 127 N. Y. 117.

96. *Bell v. Mayor, etc., of N. Y.*, 10 Paige 49.

one-third of the interest on the amount due, or the present value thereof computed, on the annuity tables.⁹⁷ But, if the other owners of the equity do not contribute their shares, a mortgagee in possession is not required to release her dower right on payment of such a sum.⁹⁸ In some cases the rights of all of the parties can be protected by subrogating her to the rights of the mortgagee, upon payment to the latter of the sums to which he is entitled. If the defendant is willing, the difficulty may be solved by permitting him to pay the dowress a gross sum in lieu of her interest in the property.⁹⁹

13. Form of interlocutory judgment, redemption of chattel mortgage.¹

(Title and caption.)

This action coming on to be tried before me at a Special Term of the Supreme Court at Part V, at the October Term for 1887, and having heard the pleadings and proofs, and made and filed my decision therein.

It is ordered and adjudged:

1. That the instrument in writing executed on the 9th day of January, 1897, between Albert E. Hughes, plaintiff's testator, and the defendant, Edward Harlam, set forth in my said decision be construed as a mortgage, with the right of redemption.

2. That plaintiff have the right to redeem and recover said property mentioned in said instrument on the payment of such sum as may be found due to defendant on said mortgage, after crediting any moneys received on sales of said remedy or otherwise received by defendant, and that there be an accounting as to the same before Elbert Crandall, Esq., Counsellor at Law, who is hereby appointed a referee to take said account and report thereon to this court.

3. That upon tender of the amount so found due that defendant forthwith deliver over to plaintiff all of the said property mentioned in said instrument executed 9th January, 1897 (including said formula or any copy thereof for the making of said "Albert's Rheumatic and Gout Remedy").

4. That defendant, Edward Harlam, his agents, servants and employees, or his assignees or transferees, be and they are hereby forever restrained from making, using, selling or disposing of said remedy or interfering with the said formula or recipe for manufacturing said remedy, or the business connected therewith.

5. That plaintiff have his costs to be taxed.

⁹⁷. *Bell v. Mayor, etc.*, of N. Y., 10 Paige 49.

⁹⁸. *Bell v. Mayor, etc.*, of N. Y., 10 Paige 49.

⁹⁹. *McKenna v. Fidelity Trust Co.*, 184 N. Y. 411.

1. This form is adapted from that used in *Hughes v. Harlam*, 166 N. Y. 427.

14. Form of interlocutory judgment, action by dowress.²

(Title.)

The issues raised in the above entitled action by the complaint of the plaintiff, and the separate answer of The Fidelity Trust Company of Buffalo, and the separate joint answer of the defendants George M. Porter and Grace Marion Porter, his wife, having been duly brought on for trial at an Equity Term of this court, and having been tried before the Hon. Daniel J. Kenefick, justice presiding, without a jury, and the court having duly made and filed its decision in writing, directing, among other things, that judgment be entered upon said issues as hereinafter provided,

Now, on motion of Clinton & Thomas, attorneys for said plaintiff, and after hearing Louis L. Babcock, Esq., counsel for said defendant, The Fidelity Trust Company of Buffalo, and John Laughlin, Esq., for said defendants, George M. Porter and Grace Marion Porter, his wife,

It is ordered, adjudged and decreed that redemption by the plaintiff of the property formerly owned by her husband Joseph McKenna be denied, upon condition that the defendant The Fidelity Trust Company of Buffalo, may and shall relieve the said premises of the plaintiff's inchoate right of dower in the same, by executing in proper form, subject to the approval of the court, an instrument under seal, wherein and whereby it releases and discharges the said dower right from the lien of the mortgage under which said defendant's present title is derived, and acknowledges that said dower right was and is wholly unimpaired and unaffected by any of the proceedings in the action heretofore brought to foreclose said mortgage; or said defendant, The Fidelity Trust Company of Buffalo, may and shall receive the said premises from said dower right by paying to the plaintiff, or in case of her refusal to accept the same, by depositing for her benefit and to her credit in the Buffalo Savings Bank, in the city of Buffalo, N. Y., the value of her said dower right.

And it is further ordered, adjudged and decreed that the election between the two methods hereinbefore provided for relieving said premises of the plaintiff's inchoate right of dower aforesaid, shall be with the plaintiff herself, provided that within thirty days after the service of a copy of this judgment with notice of entry of the same, the said plaintiff shall serve or cause to be served upon the attorneys for the defendants a notice in writing specifying her election.

And it is further ordered, adjudged and decreed that in case of an election to relieve the said premises of the defendant from plaintiff's inchoate right of dower in the same by the payment of the value of said dower right and the failure of the parties to agree upon such value, _____, counselor at law,

2. This form is adapted from that used in McKenna v. Fidelity Trust Co., 184 N. Y. 411.

be, and he hereby is appointed referee to take proofs as to such value, and to report the same and his opinion thereon with all convenient speed to this court.

And it is further ordered, adjudged and decreed that if the defendant, The Fidelity Trust Company of Buffalo, fails to release said dower or satisfy same after an election as hereinbefore provided by the plaintiff, then said plaintiff may redeem said premises upon payment of the amount due on said mortgage, the sum of \$18,998.19, together with interest thereon from the 3d day of December, 1898, and upon payment of all the sums paid by said defendant for assessments and taxes together with interest from the times of such payments.

Said premises are more particularly described as follows:

(Here follows description.)

And it is further ordered, adjudged and decreed that neither the plaintiff nor the defendants, nor either of them, are entitled to costs as against the other.

15. Form of interlocutory judgment, deed as mortgage.³

(Title and caption.)

The above entitled action being at issue and having been duly brought to trial and submitted at the term of this court above entitled, and the proofs and allegations of the respective parties having been duly heard and considered, and the decision of the court, stating separately the facts found and the conclusions of law and directing an interlocutory judgment as hereinafter provided, having been duly made and filed:

Now therefore, on motion of George H. Weaver, attorney for the plaintiff, and in pursuance of said decision, it is

Ordered, Adjudged and Decreed,

1. That the plaintiff is, and was, at the date of the deeds thereof respectively mentioned in the said findings of fact, the owner of said Ransom and Tilden parcels of land referred to in said findings.

2. That the Patent of the Ransom parcel, being the fifty-three acres described in the complaint, from the State to James H. Ransom, dated March 29th, 1888, and recorded in the Clerk's Office of Oneida County April 16, 1889, in Liber 473 of Deeds, page 472, was as between the said Ransom and the plaintiff a mortgage, and the rights acquired by the deeds of said premises from said James H. Ransom and Lucia C. Ransom, his wife, to Ira L. Snell, dated December 29th, 1896, and from said Ira L. Snell to said Lucia C. Ransom of the same date, and the deed by said Ransoms to the defendant Francis A. Cody, dated January 23rd, 1897, were as mortgagee only.

3. That the deed to Niles L. Tilden of said Tilden parcel, referred to in the said findings and in the complaint and containing sixty-three and 40/100 acres, said deed being recorded in the Clerk's

3. This form is adapted from that used in *Shelly v. Cody*, 187 N. Y. 166.

office of Oneida County, April 4, 1889, in Liber 473, page 378, was as between the said Tilden and the plaintiff a mortgage, and the rights acquired by the deed of said premises from said Tilden to the defendant Francis A. Cody, dated January 7, 1897, recorded in the Clerk's office of Oneida County January 18, 1897, in Liber 533 of Deeds, page 226, were as mortgagee only.

4. That the possession of the said premises having been obtained by the defendant Francis A. Cody, without plaintiff's consent and unlawfully, he was and still is a trespasser,—“not a mortgagee in possession”—and not entitled to charge the plaintiff with repairs, betterments, or permanent improvements made by him thereon.

5. That the plaintiff is entitled to redeem said real estate from the lien of said mortgages on payment by him to said Francis A. Cody of the sum of \$2,128.40, with interest on \$1,000 from January 7th, 1897, and on \$1,128.40 from January 23, 1897, to which should be added a reasonable sum for said Cody's services and trouble, earned between November, 1896, and March 31, 1897, in the matter of making said advances and procuring said deeds, the same to be ascertained by R. C. Briggs, Esq., counsellor at law, of Rome, N. Y., who is hereby appointed referee for that purpose, the matter to be brought to a hearing on five days' notice. On the sum thus found, the plaintiff will be credited, for use and occupation, \$350 per year, and at the like rate for any fraction of a year, from March 31st, 1897, with interest thereon, to be computed with annual rests. The costs of this action, if any, shall be awarded to the plaintiff or the defendant in the final judgment, to be charged or credited, as the case may be, and upon such payment the defendant, Francis A. Cody, will execute and deliver to the plaintiff, or such person as the plaintiff shall by instrument in writing, duly acknowledged, designate, a deed of said premises, in which his wife, the defendant Mary E. Cody, shall join, containing covenants of warranty against his own acts; said computations of interest, and for use and occupation and interest thereon, to be made as of December 1st, 1904. The money shall be paid and the deed executed and delivered on or before that day by deposit of the money in the First National bank in the City of Rome, to the credit of the said Francis A. Cody, and the delivery of the deed at the same place.

6. That the plaintiff is entitled to be restored to the possession of said farm and premises.

7. That all questions as to costs are reserved until the coming in and confirmation of the referee's report, when application for final judgment may be made.

16. Form of final judgment, redemption of chattel mortgage.*

(Title.)

A judgment in this action in favor of plaintiff and against defendant having been duly made and entered with the Clerk of the

4. This form is adapted from that used in *Hughes v. Harlam*, 166 N. Y.

County of New York on the 13th day of June, 1898, upon a trial at Special Term before Hon. Abraham R. Lawrence, Justice, adjudging a certain agreement in writing a chattel mortgage, with right of plaintiff to redeem, etc., said property so mortgaged and an appeal having been taken by defendant from said judgment to the Appellate Division on the 15th day of February, 1899, affirming said judgment with costs, and that thereupon as provided in said original judgment a reference was had as to the amount due on said chattel mortgage and the said referee having duly filed his report on the 15th day of March, 1899, whereby he finds and reports that there is due on said chattel mortgage the sum of \$3,385.50.

"Now, on motion of Wm. F. McRae, attorney for plaintiff, it is ordered and adjudged that said report of said referee be confirmed and that plaintiff be entitled to redeem and recover all the property mentioned in the said chattel mortgage at any time within thirty days on tender of payment of said three thousand three hundred and eighty-five 50/100 dollars found due as aforesaid and that upon such tender defendant restore and deliver to plaintiff all of said property, together with satisfaction of said mortgage."

And it is further ordered and adjudged that the defendant, Edward Harlam, his agents, servants and employees or his assignees or transferees be and they are hereby forever restrained from making, using, selling or disposing of said remedy or in any wise using, disposing of, disclosing or interfering with said formula, recipe for manufacturing said remedy or the business connected therewith.

It is further adjudged that plaintiff recover of defendant, Edward M. Harlam, three hundred and ninety-five 00/100 dollars costs of the action herein as taxed.

17. Form of final judgment, deed as mortgage.⁵

(Title.)

The summons and complaint in this action having been personally served upon the defendants above named on or about the 10th day of August, 1902, and each of the said defendants having thereafter regularly appeared and answered the said complaint through their attorneys, Matteson and DeAngelis of the City of Utica, N. Y., and the said complaint together with a notice of *Lis Pendens* having been thereafter, and on or about the 7th day of October, 1902, duly filed by the said plaintiff in the office of the Clerk of the County of Oneida.

And the issues in the said action having been duly and regularly brought on for trial and tried at the Court House in the City of Utica, N. Y., on the 25th day of February, 1904, and the court having thereafter and on or about September 15th, 1904, after due deliberation, made and filed its decision containing findings of fact and conclusions of law; and an interlocutory judgment having been thereupon signed, allowed and ordered by the court and together

5. This form is adapted from that used in *Shelly v. Cody*, 187 N. Y. 166.

with the said decision duly filed and entered in the Oneida County Clerk's office, on the 28th day of September, 1904.

And the court having by the terms of said decision and interlocutory judgment amongst other things duly named and designated Hon. R. C. Briggs, of Rome, N. Y., as sole referee to make certain computation of the amount of principal and interest due to the said defendant, Francis A. Cody, on two certain mortgages held by him against the said plaintiff, and to compute also the amount due to the said plaintiff from the said defendant, Francis A. Cody, for the yearly rental of the real property and premises hereinafter described at the yearly rental of \$350.00 per year, from March 31st, 1897, to December 1st, 1904, with interest thereon to be computed with annual rests; and to take and report as to the value and amount of the said defendant, Francis A. Cody's services and disbursements in procuring deeds to the said property, etc.

And the said referee having first taken and subscribed his oath of office as such; and having thereafter duly designated a day of hearing thereon at his office in the City of Rome, N. Y.; and the said referee having at the time and place so designated been attended by the attorneys for the respective parties; and having duly taken the proofs and allegations of the respective parties on the matters so referred to him; and the said referee after due deliberation thereon having made and filed his report in writing by which he finds that the said plaintiff is indebted to the said defendant, Francis A. Cody, in the sum of \$3,164.48, upon all of the matters and claims set forth in said decision and interlocutory judgment. And that the said defendant, Francis A. Cody, is indebted to the said plaintiff for the said rental computed at annual rests in the sum of \$3,288.65.

And the said defendant, Francis A. Cody, is indebted to the said plaintiff upon the account so stated in the sum of \$124.17, over and above all sums due to the said defendant, Francis A. Cody, from said plaintiff on account of said mortgages and any and all services and matters.

It is therefore, Now on motion of George H. Weaver, attorney for the plaintiff herein, after hearing Matteson & DeAngelis, attorneys for the defendant, Opposed,

It is ordered, that said report be and the same is hereby confirmed, and it is further

Ordered, adjudged and decreed, that the said plaintiff is and was at the date of the deeds therefor mentioned in the said decision and findings of fact, the owner of the said Ransom and Tilden parcels of land, and that the said defendant Francis A. Cody's claim and interest therein was as mortgagee only.

That the said defendant Francis A. Cody, has had and received in rental value, use and occupation of the said premises full payment of and on both of the said mortgages, and One Hundred Twenty-four and 17/100 Dollars in addition thereto.

It is further ordered, adjudged and decreed, that the said mortgages are hereby cancelled, paid, satisfied and discharged of record, and the said premises hereinafter described, are hereby freed and

released from the lien and incumbrance thereof, and the plaintiff is entitled to the possession of said premises.

That the said defendant Francis A. Cody, pay to the said plaintiff John J. Faulkner the said sum of \$124.17, damages due for said rental, use and occupation, without costs or disbursements to either party against the other; and that the said plaintiff have execution thereon and therefor against the said defendant Francis A. Cody, with interest thereon from and after December 1st, 1904, and that the said defendant Francis A. Cody, on or before December 1st, 1904, execute and deliver, to the plaintiff, or such person as the plaintiff shall by an instrument in writing, duly acknowledged, designate, a deed of said premises, in which his wife the defendant Mary E. Cody, shall join, containing covenants of warranty against his own acts; such deed to be duly acknowledged, and delivery made at the First National Bank in the City of Rome, N. Y., and that the said Francis A. Cody, on or before said December 1st, 1904, do surrender the possession of said premises to said plaintiff, or such person or persons, as he shall direct, and deliver to said plaintiff all deeds and writings in his custody, or possession, relating to said premises.

The premises above mentioned are bounded and described as follows:

H. Costs.

The costs of an action of redemption are discretionary under section 1477 of the Civil Practice Act.⁶ They may be awarded to either party in the sound discretion of the court, considering the peculiar circumstances of each case. Or they may be denied to both parties.⁷ Whether the plaintiff has made a tender to the defendant before the commencement of the suit has always been considered an important circumstance.⁸ In the absence of such a tender, costs have usually been allowed to the defendant,⁹ unless he has denied the right of redemption or has unreasonably defended the suit.¹⁰

6. *Calkins v. Isbell*, 20 N. Y. 147; *Pratt v. Stiles*, 17 How. Pr. 211, 9 Abb. Pr. 150; *Archer v. Cole*, 22 How. Pr. 411; *Vroom v. Ditmas*, 4 Paige 526.

7. *Cross v. Smith*, 35 Hun 49, 32 N. Y. Supp. 671.

8. *Shearer v. Field*, 6 Misc. 189, 27 N. Y. Supp. 29; *King v. Duntz*, 11 Barb. 191; *Brockway v. Wells*, 1 Paige 617; *Van Buren v. Olmstead*, 5 Paige 9.

9. *Shearer v. Field*, 6 Misc. 189, 27 N. Y. Supp. 29; *Miner v. Beekman*, 11

Abb. Pr. N. S. 147, 42 How. Pr. 33, 33 Super Ct. (1 J. & S.) 67, reversed on other grounds, 50 N. Y. 337; *Belden v. Slade*, 26 Hun 635; *Slee v. Manhattan Co.*, 1 Paige 48; *Parker v. Austin*, 15 Week. Dig. 474.

10. *Naylor v. Colville*, 20 App. Div. 581, 47 N. Y. Supp. 267; *Slee v. Manhattan Co.*, 1 Paige 48; *Brockway v. Wells*, 1 Paige 617; *Vroom v. Ditmas*, 4 Paige 526; *Van Buren v. Olmstead*, 5 Paige 9.

In the latter event, costs may be denied to both parties,¹¹ or may be awarded to the plaintiff.¹² An action of redemption may be "a difficult and extraordinary case," within the meaning of section 1513 of the Civil Practice Act, and hence an additional allowance of costs to the prevailing party may be justified.¹³

11. *King v. Duntz*, 11 Barb. 191;
Slee v. Manhattan Co., 1 Paige 48;
Brockway v. Wells, 1 Paige 617; *Vroom*
v. Ditmas, 4 Paige 526; *Van Buren v.*
Olmstead, 5 Paige 9.

12. *Calkins v. Isbell*, 20 N. Y. 147;
Slee v. Manhattan Co., 1 Paige 48;
Brockway v. Wells, 1 Bige. 617;
Vroom v. Ditmas, 4 Paige 526.

13. *Burke v. Candee*, 63 Barb. 552.

REFORMATION.

ARTICLE I.

Introductory.

PAGE

A. Nature of action.....	436
B. As an action to determine claim to real property.....	437
C. Jurisdiction of courts.....	437
D. Adequate remedy at law.....	438
E. Relief unnecessary	438
F. Discretion of court.....	439
G. Court not to make new contract.....	440

ARTICLE II.

Grounds for Reformation.

A. In general	441
B. Mutual mistake	442
1. In general	442
2. Mistake of draftsman or scrivener.....	443
3. Mistake of interpreter.....	444
C. Unilateral mistake	444
1. In general	444
2. Ignorance or negligence of party.....	446
D. Mistake of one party with fraud of other party.....	447
1. In general	447
2. Illustrations of fraud.....	448
E. Mistake of law.....	451
F. Ambiguity	452

ARTICLE III.

Instruments Reformatable.

A. In general	453
B. Deeds	453
1. In general	453
2. Discription of premises.....	454
3. Acreage	455
4. Estate conveyed	456
5. Assumption of mortgage.....	457
6. Parties	457
7. Restrictive covenants	458
8. Deed given pursuant to judicial sale.....	458
C. Executory contracts for sale of lands.....	458
D. Notes	459
E. Bonds	459

	PAGE
F. Mortgages	460
G. Leases	461
H. Sales	461
I. Construction contracts	462
J. Contracts of suretyship or indemnity	462
K. Insurance policies	463
1. In general	463
2. Life insurance	465
3. Fire insurance	466
4. Burglary or theft insurance	468
5. Liability insurance	469
L. Wills	469
M. Separation agreements	469
N. Illegal verbal contracts	470

ARTICLE IV.

Defenses.

A. Alteration of instrument	470
B. Statute of limitations	470
1. In general	470
2. Laches	471
C. Waiver	473

ARTICLE V.

Procedure.

A. Parties	473
1. Plaintiff	473
2. Defendants	474
3. Purchasers in good faith	475
B. Complaint	476
2. Joinder of causes	477
3. Amendment	477
4. Form of complaint for reformation of deed	478
5. Form of complaint for reformation of deed on the ground of deficiency of average	480
6. Form of complaint for reformation of fire insurance policy	482
7. Another form of complaint to reform fire insurance policy	484
C. Counterclaim	486
D. Reformation as defense or counterclaim to another action	486
E. Trial of issues	487
F. Temporary injunction	489
G. Abatement and revival	489
H. Relief granted	489
1. In general	489
2. Relief in lieu of reformation	490
3. Form of decision	490
4. Form of judgment	493
I. Costs	494
J. Appeals	495

ARTICLE VI.

	Evidence.	PAGE
A. Parol evidence		496
B. Burden of proof.		497
C. Sufficiency of evidence.		497

ARTICLE I.

INTRODUCTORY.

A. Nature of action.

An action of Reformation is a form of remedy purely of equitable cognizance. It is a well recognized branch of equity jurisprudence.¹ It is available, speaking in general terms, when the parties have entered into a written engagement, but, through mistake, fraud, or inadvertance, the instrument purporting to evidence their agreement does not correctly state their intent. This situation being brought before a court of equity by proof of a sufficiently convincing nature, a decree is made correcting or reforming the writing so as to correspond with the agreement the parties actually contemplated.² The necessity for this remedy arises from the rule of evidence which excludes parol evidence tending to vary the terms of a written instrument.³ In the absence of any demand for a reformation of the contract, a court of law is unable, as a general rule, to render a judgment except in enforcement of the instrument as written.⁴ The remedy necessarily involves an

1. *Roussel v. Lux*, 39 Misc. 508, 80 N. Y. Supp. 341.

2. *Pitcher v. Hennessey*, 48 N. Y. 415; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Paine v. Upton*, 87 N. Y. 327; *Allison Bros. Co. v. Allison*, 144 N. Y. 21; *Curtis v. Albee*, 167 N. Y. 360; *Baird v. Erie R. Co.*, 210 N. Y. 225; *MacDonald v. Crissey*, 215 N. Y. 609; *Friedman Marble & Slate Works v. Whitcomb*, 186 App. Div. 509, 174 N. Y. Supp. 531; *Millspaugh v. Cassidy*, 191 App. Div. 221, 181 N. Y. Supp. 276; *Portugal v. Reisman*, 192 App. Div. 492, 193 N. Y. Supp. 190; *Fishell v. Bell*, *Clarke* 37; *Bartholomew v. Mercantile Marine Ins. Co.*, 34 Hun 263; *Real Estate T. Co. v. Balch*, 13 Jones & S. (45 Super. Ct.) 528; *Jenkins v.*

Lefaiver, 9 N. Y. Supp. 19, 29 St. Rep. 886; *Gilroy v. Straus Bldg. & Realty Co.*, 157 N. Y. Supp. 162, affirmed without opinion, 172 App. Div. 956, 157 N. Y. Supp. 1126.

3. *Linton v. Unexcelled Fire-Works Co.*, 128 N. Y. 672; *Portugal v. Reisman*, 192 App. Div. 492, 183 N. Y. Supp. 190; *Miaghan v. Hartford F. Ins. Co.*, 12 Hun 321; *Sheffield v. Hamlin*, 26 Hun 237; "Equity does not overrule positive law; it moulds and adopts the law to conditions in subordination of and in harmony with law." *Klein v. Mechanics' & Traders' Bank*, 145 App. Div. 615, 130 N. Y. Supp. 436.

4. *Linton v. Unexcelled Fire-Works Co.*, 128 N. Y. 672; *Gillespie v. Moon*, 2 Johns. Ch. 585.

exception to that well established rule of evidence.⁵ It is neither necessary nor proper to maintain a suit to reform an oral contract, for the intent of the parties to such a contract can be shown when it is in controversy.⁶

In the early history of the remedy, it was looked upon with disfavor because it was in conflict with the sound principle of the common law as to the use of parol evidence. The power of the courts of equity was at first exercised only in case of a fraudulent suppression of the terms of the contract or of the incorporation of stipulations never within the contemplation of the parties. Later the remedy was extended to cases of innocent accident, inadvertance or mistake.⁷

B. As an action to determine claim to real property.

An action for the reformation of a contract, although the agreement relates to real property, is not an action to compel the determination of a claim to real property within the meaning of Article 15 of the Real Property Law.⁸ Hence, section 504 of the Real Property Law prescribing certain matters of procedure relative to such actions does not apply to an action to reform a deed.⁹

C. Jurisdiction of courts.

The jurisdiction of an action of reformation is vested in the Supreme Court by virtue of its succession to the powers of the court of chancery. Under section 67 of the Civil Practice Act, county courts are given jurisdiction of some equitable causes, but an action of reformation is not one of the actions therein mentioned.¹⁰ Although a county court has jurisdiction of an action to foreclose a mortgage on real property within the county, it cannot entertain an action where it is sought to reform a mortgage and foreclose it as reformed.¹¹ The City Court of the City of New York has jurisdiction of a few actions of equitable nature, but it has no power to reform a written agreement.¹² The Municipal

5. *Bartholomew v. Mercantile Marine Ins. Co.*, 34 Hun 263.

6. *Sheffield v. Hamlin*, 26 Hun 237.

7. *Kent v. Manchester*, 29 Barb. 595.

8. *Garth Estates v. Bronx Parkway Commission*, 177 App. Div. 6, 163 N. Y. Supp. 950.

9. *Garth Estates v. Bronx Parkway*

Commission, 177 App. Div. 6, 163 N. Y. Supp. 950.

10. *Thomas v. Harmon*, 122 N. Y. 84; *Avery v. Willis*, 24 Hun 548.

11. *Thomas v. Harmon*, 122 N. Y. 84; *Avery v. Willis*, 24 Hun 548.

12. *Wiederman v. Verschleiser*, 93 Misc. 453, 158 N. Y. Supp. 308.

Court of the City of New York is also limited in its equity jurisdiction.¹³

D. Adequate remedy at law.

It is the general rule of equity jurisprudence that courts of equity will not assume jurisdiction of a controversy if the complaining party has an adequate remedy in an action at law. This fundamental proposition, however, interposes no bar in an action of reformation. In an action at law the writing is enforced according to its terms, and parol evidence is not admissible to show an error in reducing the agreement of the parties to writing. Hence, there is no adequate remedy at law, and equity willingly assumes the power to afford relief.¹⁴ But, if the circumstances of the case are such that all the questions in dispute can be determined in an action at law, equity will not afford relief.¹⁵

E. Relief unnecessary.

A court of equity will not entertain an action for the reformation of a written instrument, unless relief is necessary for the protection of the plaintiff.¹⁶ If, without reformation or judicial proceedings, the contract is clearly to be interpreted so as to express the intention claimed by the plaintiff, there is no necessity for an action of reformation, and such an action should be dismissed.¹⁷ Any other rule might infringe the constitutional right to a jury trial of the issues in an action at law.¹⁸ Where the intention of the parties is plain and a material word of a contract has

13. *Kraus v. Smolen*, 46 Misc. 463, 92 N. Y. Supp. 329. See also, *O'Rourke v. Snell*, 147 N. Y. Supp. 31.

14. *Portugal v. Reisman*, 192 App. Div. 492, 183 N. Y. Supp. 190; *MacGowan v. Gein*, 13 St. Rep. 421, 28 Week. Dig. 31; affirmed without opinion, 122 N. Y. 643.

A liquor tax certificate issued under the former liquor Tax Law, was not correctible by motion, but only in an action in equity. *Matter of Littleton*, 113 App. Div. 471, 99 N. Y. Supp. 417.

15. *Bowman v. Poppenberg*, 53 Misc. 373, 103 N. Y. Supp. 245.

16. *Western Union Teleg. Co. v.*

Shepard, 169 N. Y. 170; *Sullivan v. Corn Exch. Bank*, 154 App. Div. 292, 139 N. Y. Supp. 97; *McManus v. Harrigan*, 41 Misc. 615, 85 N. Y. Supp. 220; *Smith v. Bellows*, 3 St. Rep. 305, 25 Week. Dig. 61.

17. *Pittsburgh Amusement Co. v. Ferguson*, 115 App. Div. 241, 101 N. Y. Supp. 217, affirmed without opinion, 193 N. Y. 635; *Ludington's Sons' v. Fidelity & D. Co.*, 96 Misc. 243, 160 N. Y. Supp. 600.

18. *Ludington's Sons' v. Fidelity & D. Co.*, 96 Misc. 243, 160 N. Y. Supp. 600.

been omitted, it is not essential that the instrument be reformed, for in an action at law to enforce liability thereunder, the omitted word may be read into the contract, if necessary.¹⁹ A mere clerical error in the writing may be explained without the necessity of an action of reformation.²⁰ If two copies of an agreement are dissimilar, parol evidence is admissible to show which of the writings contains the actual agreement of the parties, and a case is not presented for the interposition of equity to reform the erroneous copy.²¹ If relief is desired on the ground of fraud and it appears on the face of the instrument that by artifice and deception a contracting party has been misled, a reformation of the contract is not necessary.²² Equitable relief is not necessary for the correction of entries in account books, for their inaccuracy may be shown in an action at law.²³ There is no necessity for the reformation of an *oral* contract.²⁴

F. Discretion of court.

In some forms of equitable actions, the granting of relief is said to be in the discretion of the court. This is particularly so, when an action at law or some other form of procedure will afford a substantial remedy. But, in an action of reformation, the denial of the relief sought will usually preclude the plaintiff from any remedy. Hence, if the plaintiff satisfactorily shows that the written instrument does not conform to the actual agreement of the parties, the reformation is granted, and the discretionary power of the court is not considered. The discretion of the court may be a question of more difficulty if it is claimed that the plaintiff has been guilty of laches.²⁵ And the allowance of costs always calls for the exercise of discretion.²⁶

19. *People v. Torn*, 110 App. Div. 679, 97 N. Y. Supp. 523.

20. *Smith v. Bellows*, 3 St. Rep. 305, 25 Week. Dig. 61.

21. *Bowman v. Poppenberg*, 53 Misc. 373, 103 N. Y. Supp. 245.

22. *Nellis v. Western L. Indemnity Co.*, 207 N. Y. 320.

23. *Kosovits v. N. Y. First Hungarian, etc., Soc.*, 130 N. Y. Supp. 72.

24. *Sheffield v. Hamlin*, 26 Hun 237.

25. *Welles v. Yates*, 44 N. Y. 525; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; *Wilson v. National Life Ins. Co.*, 31 Misc. 403; 65 N. Y. Supp. 550, affirmed without opinion, 56 App. Div. 624, 67 N. Y. Supp. 1150. And see, *infra*, IV-B-2, Laches.

26. See, *infra*, V-I, Costs.

G. Court not to make new contract.

In the reformation of a contract so as to express the true intention of the parties, the court should be careful to avoid making a new contract for the parties. The court, under the guise of reformation, can not make a new contract which neither party intended to execute.²⁷ A decree should not be made to compel a party to enter into or be bound by a contract which he never made.²⁸ A court of equity has no general supervisory power over the contracts of competent parties and must not change their agreement into one which might have been wiser or more appropriate.²⁹ The fact that the enforcement of the written contract may work a hardship on one of the parties, of itself, is no ground for a reformation.³⁰ If the parties have attempted to contract but their minds have failed to meet, the court cannot supply the defect and adjudge a valid contract to exist.³¹ The fact that the security which the parties adopted has failed does not justify the court in substituting some other security.³²

27. *Leavitt v. Palmer*, 3 N. Y. 19; *Lanning v. Carpenter*, 48 N. Y. 408; *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 51; *Curtis v. Albee*, 167 N. Y. 360; *Albro v. Gowland*, 98 App. Div. 474, 90 N. Y. Supp. 796; *Rosen v. Phillips-born Co.*, 135 App. Div. 499, 120 N. Y. Supp. 486; *Wayte v. Bowker Chemical Co.*, 180 App. Div. 568, 168 N. Y. Supp. 122; *McCauley v. Brooklyn Steam Marble Co.*, 190 App. Div. 595, 180 N. Y. Supp. 365; *Matter of Warren*, 207 App. Div. 793, 202 N. Y. Supp. 586; *Casterton v. McIntire*, 3 Misc. 380, 23 N. Y. Supp. 301, 54 St. Rep. 148; *Curtis v. Giles*, 7 Misc. 590, 28 N. Y. Supp. 489, 58 St. Rep. 503; *Dougherty v. Lion Fire Ins. Co.*, 41 Misc. 285, 84 N. Y. Supp. 10, affirmed on opinion below, 95 App. Div. 618, 98 N. Y. Supp. 1096, reversed on other grounds, 183 N. Y. 302; *Scott v. Finocchiario*, 118 Misc. 322, 193 N. Y. Supp.

81; *Geiger Watch Case Corp. v. Fidelity & Deposit Co.*, 120 Misc. 441, 119 N. Y. Supp. 555; *New York Ice Co. v. North Western Ins. Co.*, 31 Barb. 72; *Botsford v. McLean*, 45 Barb. 478; *Syms v. City of New York*, 18 Jones & S. (50 Super. Ct.) 289; *Clark v. Blumenthal*, 21 Jones & S. (53 Super. Ct.) 211.

28. *Salomon v. North British, etc., Ins. Co.*, 215 N. Y. 214.

29. *Curtis v. Albee*, 167 N. Y. 360; *Drachler v. Foote*, 88 App. Div. 270, 84 N. Y. Supp. 977; *Albro v. Cowland*, 98 App. Div. 474, 90 N. Y. Supp. 796; *Hirshback v. Schmalz*, 7 N. Y. Supp. 377, 27 St. Rep. 14.

30. *Ward v. Union Trust Co.*, 172 App. Div. 569, 159 N. Y. Supp. 54.

31. *Botsford v. McLean*, 45 Barb. 478.

32. *Lanning v. Carpenter*, 48 N. Y. 408.

ARTICLE II.

GROUNDS FOR REFORMATION.

A. In general.

As a general rule, an action for the reformation of a written instrument may be based on either of two grounds, (1) mutual mistake of the parties; or (2) mistake of one party coupled with fraud of the other.³³ And it is also the general rule that there is no other ground upon which the action can be maintained.³⁴ If a contract is executed by one

33. Welles v. Yates, 44 N. Y. 525; Albany City Sav. Inst. v. Burdick, 87 N. Y. 40; Friedman Marble & Slate Works v. Whitcomb, 186 App. Div. 509, 174 N. Y. Supp. 531; Portugal v. Reisman, 192 App. Div. 492, 183 N. Y. Supp. 190; Kass v. Garment Center Realty Co., 209 App. Div. 647, 205 N. Y. Supp. 94; Voci v. Page, 123 Misc. 766, 206 N. Y. Supp. 128; Botsford v. McLean, 45 Barb. 478; Devereux v. Sun Fire Office, 51 Hun 147, 4 N. Y. Supp. 655, 20 St. Rep. 584; Gillespie v. Moon, 2 Johns. Ch. 585; Monne v. Ayer, 20 Jones & S. (52 N. Y. Super. Ct.) 139; Stryker v. Schuyler, 3 N. Y. Supp. 513, 20 St. Rep. 452, affirmed without opinion, 132 N. Y. 547; Basserman v. Staten Island Belt Line Co., 8 N. Y. Supp. 548, 29 St. Rep. 270; Jenkins v. Lefaiver, 9 N. Y. Supp. 19, 29 St. Rep. 886; Hamilton v. Fidelity & C. Co., 171 N. Y. Supp. 580; Anderson v. Metropolitan L. Ins. Co., 18 Week. Dig. 192.

34. Leavitt v. Palmer, 3 N. Y. 19; Story v. Conger, 36 N. Y. 673; Bryce v. Lorillard, F. Ins. Co., 55 N. Y. 240; Jackson v. Andrews, 59 N. Y. 244; Wilson v. Deen, 74 N. Y. 531; Moran v. McLarty, 75 N. Y. 25; Paine v. Jones, 75 N. Y. 593; Avery v. Equitable L. Assur. Soc., 117 N. Y. 451; Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co., 149 N. Y. 51; Husted v. Van Ness, 158 N. Y. 104; Salomon v. North British, etc., Ins. Co., 215 N. Y. 214; Metzger v.

Aetna Insurance Co., 227 N. Y. 411; Husted v. Van Ness, 1 App. Div. 120, 36 N. Y. Supp. 1043, 72 St. Rep. 28, affirmed, 158 N. Y. 104; London Assur. Corp. v. Thompson, 22 App. Div. 64, 47 N. Y. Supp. 830; Consolidated Elec. Storage Co. v. Atlantic T. Co., 24 App. Div. 172, 48 N. Y. Supp. 1083, 31 App. Div. 630, 53 N. Y. Supp. 1102, affirmed, 161 N. Y. 605; Carey Mfg. Co. v. Merchants Ins. Co., 42 App. Div. 201, 59 N. Y. Supp. 7; Garvey v. New York, etc., Banking Co., 57 App. Div. 193, 68 N. Y. Supp. 317; Trotter v. Brevoort, 60 App. Div. 562, 69 N. Y. Supp. 1028; Miller v. Carpenter, 68 App. Div. 346, 74 N. Y. Supp. 231; Trust Co. of N. Y. v. Universal Talking Machine Co., 90 App. Div. 207, 86 N. Y. Supp. 60; Kenyon Paper Co. v. Nederlandsche Lloyds, 124 App. Div. 886, 109 N. Y. Supp. 311; Lake View Brewing Co. v. Commerce Ins. Co., 143 App. Div. 665, 128 N. Y. Supp. 337; Syenite Trap Rock Co. v. Williams, 167 App. Div. 774, 153 N. Y. Supp. 74; Leary v. Geller, 169 App. Div. 232, 154 N. Y. Supp. 507; Charles Albert Co. v. Newton Creek Realty Corp. 211 App. Div. 1, 206 N. Y. Supp. 673; Duke v. Stuart, 45 Misc. 120, 91 N. Y. Supp. 885, affirmed, 105 App. Div. 376, 94 N. Y. Supp. 235, appeal dismissed, 194 N. Y. 495; 154 West 14th St. v. D. A. Schulte, Inc., 121 Misc. 853, 202 N. Y. Supp. 737, affirmed, 210 App. Div. 851, 206 N. Y. Supp. 942; Wemple v. Stewart, 22

with full knowledge of its terms, he is entitled to no relief.³⁵

B. Mutual mistake.

1. In general.

The usual ground for the maintenance of an action of reformation is that by mutual mistake of the parties the instrument in suit does not correspond with the actual intent of the parties. There is no dissent from the general proposition that this is a sufficient ground for equitable relief.³⁶ A mutual mistake is one which is reciprocal and common to both parties, as where each alike has labored under the same misconception in respect to the terms of the written instrument.³⁷ The writing may be reformed by striking out a clause inserted by mutual mistake, or by including a clause inadvertently omitted; but, if the parties have deliberately omitted a certain clause, the courts cannot insert it.³⁸ If the defendant has acted in good faith, the relief is not to be granted unless the mistake was mutual, a mistake by the plaintiff not being sufficient to sustain the action.³⁹ Expressions in some of the opinions might indicate a modification of this rule. Thus it is said, "It is only where the action is

Barb. 154; *O'Donnell v. Harmon*, 3 Daly 424; *Miaghan v. Hartford F. Ins. Co.*, 12 Hun 321; *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 78 Hun 462, 29 N. Y. Supp. 233, 60 St. Rep. 774, affirmed, 149 N. Y. 51; *Brown v. Brown*, 79 Hun 44, 29 N. Y. Supp. 652, 61 St. Rep. 132, affirmed on opinion below, 150 N. Y. 574; *Paisley v. Casey*, 18 N. Y. Supp. 102, 41 St. Rep. 339; *Disbrow v. Disbrow*, 146 N. Y. Supp. 63.

35. *Treacy v. Hecker*, 51 How. Pr. 69. And see, *infra*, II-C, Unilateral Mistake.

36. *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Darnour v. Chapman*, 2 App. Div. 112, 37 N. Y. Supp. 674, 73 St. Rep. 255; *Schuessler v. Fire Ins. Co. of Philadelphia*, 103 App. Div. 12, 92 N. Y. Supp. 649, affirmed without opinion, 185 N. Y. 578; *House v. Wechsler*, 104 App. Div. 124, 93 N. Y. Supp. 593; *Knobloch v. Kracke*, 151 App. Div. 19, 135 N. Y. Supp. 381;

Eidlitz v. Manhattan Wrecking & Contracting Co., 164 App. Div. 591, 150 N. Y. Supp. 307; *Isaacs v. Schmuck*, 218 App. Div. 516, 194 N. Y. Supp. 155; *Schultz v. Busendorf*, 117 Misc. 405, 191 N. Y. Supp. 629; *Botsford v. McLean*, 45 Barb. 478; *Cortland Howe Ventilating Stove Co. v. Howe*, 92 Hun 113, 36 N. Y. Supp. 701, 71 St. Rep. 766; *Witthaus v. Schack*, 57 How. Pr. 310; *Real Estate T. Co. v. Balch*, 13 Johns. & S. (45 Super. Ct.) 528; *Everett v. Jones*, 14 N. Y. Supp. 395, 38 St. Rep. 644; *Bayrhoff v. Rohde*, 16 N. Y. Supp. 851; *Renz v. Ernst*, 160 N. Y. Supp. 577.

37. *Botsford v. McLean*, 45 Barb. 478.

38. *McCauley v. Brooklyn Stean Marble Co.*, 190 App. Div. 595, 180 N. Y. Supp. 365.

39. See, *infra*, II-C, Unilateral mistake.

to reform the agreement itself that it is required that it should be alleged in the pleading and proved on the trial that the mistake was mutual; and where there is no mistake about the agreement and the only mistake alleged is in the reduction of that agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected."⁴⁰ Although this expression, or one substantially similar, has frequently been used in opinions, it is not a well reasoned statement of law. If the mistake is that of a scrivener or other person who is acting for both parties, the mistake is the mistake of both parties and hence is mutual. Moreover, the attempted distinction between a mistake in the agreement of the parties and a mistake in the reduction of their agreement to writing, is confusing. The primary function of an action of reformation is the correction of writings which have been erroneously written; if the parties have made a mistake in their prior negotiations, there has not been a meeting of the minds, and the remedy is by an action for rescission, and not to ask the court to make a contract for them under the guise of a reformation.

2. Mistake of draftsman or scrivener.

Frequently in actions of reformation, it appears that the parties have chosen a scrivener or draftsman to reduce their agreement to writing and that through the error of such representative, the completed instrument does not correctly interpret their actual agreement. As the draftsman acts for both parties, his mistake may be said to be a mutual mistake of the parties, and a reformation of the writing is properly granted.⁴¹ An error made by a stenographer in the

⁴⁰ *Pitcher v. Hennessey*, 48 N. Y. 415; *Born v. Schrenkeisen*, 110 N. Y. 55; *MacDonald v. Crissey*, 215 N. Y. 609; *Raby v. Greater N. Y. Development Co.*, 151 App. Div. 72, 135 N. Y. Supp. 813, affirmed without opinion, 210 N. Y. 586; *Friedman Marble & Slate Works v. Whitcomb*, 186 App. Div. 509, 174 N. Y. Supp. 531; *Hebler v. Brown*, 18 Misc. 395, 41 N. Y. Supp. 441; *Schrieber v. Goldsmith*, 39 Misc. 381, 79 N. Y. Supp. 846; *Gilroy v. Strauss Bldg. & Realty Co.*, 157 N. Y. Supp. 162, affirmed without opinion,

172 App. Div. 956, 157 N. Y. Supp. 1126.

⁴¹ *Pitcher v. Hennessey*, 48 N. Y. 415; *MacDonald v. Crissey*, 215 N. Y. 609; *Born v. Schrenkeisen*, 110 N. Y. 55; *Bacot v. Fessenden*, 139 App. Div. 647, 124 N. Y. Supp. 370; *Raby v. Greater N. Y. Development Co.*, 151 App. Div. 72, 135 N. Y. Supp. 813, affirmed without opinion, 210 N. Y. 586; *Halbe v. Adams*, 176 App. Div. 588, 163 N. Y. Supp. 895; *Friedman Marble & Slate Works v. Whitcomb*, 186 App. Div. 509, 174 N. Y. Supp.

transcribing of the stenographic minutes may justify the relief.⁴² But, if the draftsman acts for but one of the parties, his error is the mistake of only his employer; and, if the instrument is later submitted to the other party who accepts it, there is not a mutual mistake of the parties.⁴³

3. Mistake of interpreter.

If an interpreter employed by one of the parties incorrectly informs his principal as to the contents of an instrument he is about to execute, the mistake is not mutual; and, if the other party is not guilty of any artifice or fraud, the instrument is not subject to reformation.⁴⁴ A different rule might prevail if the interpreter acted for both parties and misinformed both, for then it might be said that the mistake was mutual.

C. Unilateral mistake.

1. In general.

While relief by way of a reformation of a written instrument may be allowed on the ground of a *mutual* mistake of the parties, relief is not to be granted merely because of the mistake of *one* party.⁴⁵ A contract, in a proper case, may be

531; *Delap v. Leonard*, 189 App. Div. 87, 178 N. Y. Supp. 102; *Isaacs v. Schmuck*, 218 App. Div. 516, 194 N. Y. Supp. 155; *Hebler v. Brown*, 18 Misc. 395, 41 N. Y. Supp. 441.

42. *Schall v. Schwartz & Co.*, 177 App. Div. 765, 165 N. Y. Supp. 35.

43. *White v. Meyer*, 7 Daly 428; *Mills v. Lewis*, 55 Barb. 179, 37 How. Pr. 418.

44. *Phillip v. Gallant*, 1 Hun 528, 3 T. & C. 618, affirmed, 62 N. Y. 256.

45. *Nevius v. Dunlap*, 33 N. Y. 676; *Jackson v. Andrews*, 59 N. Y. 244; *Mead v. Westchester F. Ins. Co.*, 64 N. Y. 453; *Paine v. Jones*, 75 N. Y. 593; *Allison Bros. Co. v. Allison*, 144 N. Y. 21; *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 51; *Greene v. Smith*, 160 N. Y. 533; *Curtis v. Albee*, 167 N. Y. 360; *Salomon v. North British, etc., Ins. Co.*, 215 N. Y. 214; *Metzger v. Aetna*

Insurance Co., 227 N. Y. 411; *Drachler v. Foote*, 88 App. Div. 270, 84 N. Y. Supp. 977; *Albro v. Gowland*, 98 App. Div. 474, 90 N. Y. Supp. 796; *Kenyon Paper Co. v. Nederlandsche Lloyds*, 124 App. Div. 886, 109 N. Y. Supp. 311; *Stolitzky v. Linschied*, 150 App. Div. 253, 134 N. Y. Supp. 805; *Raby v. Greater N. Y. Development Co.*, 151 App. Div. 72, 135 N. Y. Supp. 813, affirmed without opinion, 210 N. Y. 586; *Leary v. Geller*, 169 App. Div. 232, 154 N. Y. Supp. 507; *Kues v. Foran Foundry & Mfg. Co.*, 191 App. Div. 25, 180 N. Y. Supp. 695; *Lewitt & Co., Inc. v. Jewelers' Safety Fund Soc.*, 221 App. Div. 727, 224 N. Y. Supp. 549; *Dougherty v. Lion Fire Ins. Co.*, 41 Misc. 285, 94 N. Y. Supp. 10, affirmed on opinion below, 95 App. Div. 618, 88 N. Y. Supp. 1096, reversed on other grounds, 183 N. Y. 302; *Prindle v. Board of Education*, 61

rescinded for a mistake of one party,⁴⁶ but a different rule prevails in an action of reformation, the law requiring some equitable consideration other than the mistake of one party. The fact that one party has made a mistake and has acted improvidently, or that the written instrument imposes a hardship upon him, or his expectations of benefit were illusory, does not entitle him to relief, in the absence of fraud or improper conduct by another party.⁴⁷ If the contract is strictly in accordance with the intent of one of the parties, it will not be reformed at the suit of the other.⁴⁸ A party

Misc. 533, 115 N. Y. Supp. 888; Dressler v. Mulhern, 77 Misc. 476, 136 N. Y. Supp. 1049; Geiger Watch Case Corp. v. Fidelity & Deposit Co., 120 Misc. 441, 199 N. Y. Supp. 555; Silver Fox Co. v. New York Indemnity Co., 125 Misc. 430, 210 N. Y. Supp. 18; Ranney v. McMullen, 5 Abb. N. C. 246; Kent v. Manchester, 29 Barb. 595; Mills v. Lewis, 55 Barb. 179, 37 How. Pr. 418; VanTuyt v. Westchester F. Ins. Co., 67 Barb. 72, affirmed, 55 N. Y. 657; O'Donnell v. Harmon, 3 Daly 424; McHugh v. Imperial F. Ins. Co., 48 How. Pr. 230; Humphreys v. Hurtt, 50 How. Pr. 291; Heelas v. Slevin, 53 How. Pr. 356; Miaghan v. Hartford F. Ins. Co., 12 Hun 321; Devereux v. Sun Fire Office, 51 Hun 147, 4 N. Y. Supp. 655, 20 St. Rep. 584; Syms v. City of New York, 18 Jones & S. (50 Super. Ct.) 289; Lyman v. United Ins. Co., 17 Johns. 373; Smith v. Mackin, 4 Lans. 41; Jenkins v. Lefaiver, 9 N. Y. Supp. 19, 29 St. Rep. 886; Fitzgerald v. Arcade Theater Co., 153 N. Y. Supp. 618, affirmed without opinion, 172 App. Div. 932, 156 N. Y. Supp. 1122; Lanier v. Wyman, 5 Rob. 147. "To warrant the reformation, the minds of the parties must have met in a contract and in the mistake through which it failed of expression. There being no fraud, the policy cannot be reformed if it expressed the intentions of the defendant only. The mistake which will permit a court of equity to reform a contract in writing

in the absence of fraud must be one made by both parties to the agreement so that the intentions of neither are expressed in it. The mistake or each mistake must be shared in by both parties. Salomon v. North British, etc., Ins. Co., 215 N. Y. 214.

46. See the chapter on Rescission.

47. Consolidated Elec. Storage Co. v. Atlantic T. Co., 24 App. Div. 172, 48 N. Y. Supp. 1083, 31 App. Div. 630, 53 N. Y. Supp. 1102, affirmed, 161 N. Y. 605; Garvey v. New York, etc., Banking Co., 57 App. Div. 193, 68 N. Y. Supp. 317; Albro v. Gowland, 98 App. Div. 474, 90 N. Y. Supp. 796; Hirshback v. Schmalz, 7 N. Y. Supp. 377, 27 St. Rep. 14.

48. Nevius v. Dunlap, 33 N. Y. 676; Welles v. Yates, 44 N. Y. 525; Bryce v. Lorillard, F. Ins. Co., 55 N. Y. 240; Paine v. Jones, 75 N. Y. 593; Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co., 149 N. Y. 51; Curtis v. Albee, 167 N. Y. 360; Salomon v. North British, etc., Ins. Co., 215 N. Y. 214; Metzger v. Aetna Insurance Co., 227 N. Y. 411; Drachler v. Foote, 88 App. Div. 270, 84 N. Y. Supp. 977; Ocheo Realty Corp. v. Sev. Realty Corp., 205 App. Div. 324, 199 N. Y. Supp. 466; Charles Albert Co. v. Newton Creek Realty Corp., 211 App. Div. 1, 206 N. Y. Supp. 673; Curtis v. Giles, 7 Misc. 590, 28 N. Y. Supp. 489, 58 St. Rep. 503; Dressler v. Mulhern, 77 Misc. 476, 136 N. Y. Supp. 1049;

who prepares a contract and tenders it to the other party for acceptance and execution, is bound thereby, and in the absence of fraud or undue advantage, cannot have a reformation.⁴⁹

The reason underlying the rule is that, if but one party has made a mistake, there has not been a meeting of the minds, and the correction of the mistake as to one party would be the creation of a new contract as to the other party. If the minds of the parties have not met, the contract may properly be rescinded, but a new contract by way of a judgment of reformation should not be foisted on a party.⁵⁰

2. Ignorance or negligence of party.

The ignorance of a party as to the contents of an instrument which he signs is no ground for reformation, although the contract may have been prepared by another party who is cognizant of the terms thereof.⁵¹ Likewise, the ignorance of a party as to extraneous facts, such as the value of the property transferred, or a similar matter, affords no ground for reformation.⁵² If there is no fraud, undue advantage or other unconscionable element in the case, the contract will not be reformed because it contains a stipulation not contemplated by a party or omits one which he expected the agreement to contain.⁵³ He who signs or accepts a written

Geiger Watch Case Corp. v. Fidelity & Deposit Co., 120 Misc. 441, 199 N. Y. Supp. 555; *Ranney v. McMullen*, 5 Abb. N. C. 246; *Eames Vacuum Brake Co. v. Prosser*, 88 Hun 343, 34 N. Y. Supp. 398, 68 St. Rep. 388, affirmed, 157 N. Y. 289. "A court of equity, in correcting an agreement by parties upon the ground of mistake, proceeds upon the theory that it does not express their real sense and it is most evident that the mutuality of the mistake must be made out, and the fact of a different agreement having been intended by both established, by evidence which is clear and convincing." *Allison Bros. Co. v. Allison*, 144 N. Y. 21.

49. *Fitzgerald v. Arcade Theater Co.*, 153 N. Y. Supp. 618, affirmed without opinion, 172 App. Div. 932, 156 N. Y. Supp. 1122.

50. *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 51; *Mills v. Lewis*, 55 Barb. 179, 37 How. Pr. 418; *Brown v. Brown*, 79 Hun 44, 29 N. Y. Supp. 652, 61 St. Rep. 132, affirmed on opinion below, 150 N. Y. 574.

51. *Moran v. McLarty*, 75 N. Y. 25; *Metzger v. Aetna Insurance Co.*, 227 N. Y. 411; *Simon v. LaBar*, 219 App. Div. 624, 220 N. Y. Supp. 763; *Davenport v. Holbert*, 131 Misc. 511, 227 N. Y. Supp. 137; *Witthaus v. Schack*, 57 How. Pr. 310.

52. *Curtis v. Albee*, 167 N. Y. 360.

53. *Moran v. McLarty*, 75 N. Y. 25; *Metzger v. Aetna Insurance Co.*, 227 N. Y. 411; *Consolidated Elec. Storage Co. v. Atlantic T. Co.*, 24 App. Div. 172, 48 N. Y. Supp. 1083, 31 App. Div. 630, 53 N. Y. Supp. 1102, affirmed, 161 N. Y. 605.

contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them.⁵⁴ But, if there exists a confidential relation between the parties or if the execution is induced by artifice, relief may be granted, although the plaintiff was unaware of the contents of the instrument.⁵⁵

If there exists a mutual mistake of the parties, or if there is a mistake of one party accompanied by fraud of the other party, and hence there exists a cause of action of reformation, the fact that the plaintiff has been negligent in ascertaining the contents of the instrument he signed, does not necessarily bar the relief.⁵⁶ Particularly is this true, when the defendant has not been prejudiced by any negligence of the plaintiff.⁵⁷ But, if the negligence of the complaining party was the cause of the mistake, the court may refuse to reform the instrument.⁵⁸ Or, the negligence of the plaintiff may be considered with the other circumstances of the case as bearing upon the discretion of the court in granting or denying the relief.⁵⁹

D. Mistake of one party with fraud of other party.

1. In general.

While a mistake by one party is not a sufficient ground for the reformation of a written instrument, such a mistake coupled with fraud of the other party, justifies relief.⁶⁰

⁵⁴ *Metzger v. Aetna Insurance Co.*, 227 N. Y. 411.

⁵⁵ *Witthaus v. Schack*, 57 How. Pr. 310.

⁵⁶ *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Jamaica Sav. Bank v. Taylor*, 72 App. Div. 567, 76 N. Y. Supp. 790; *Ulman v. Equitable L. Assur. Soc.*, 161 App. Div. 708, 146 N. Y. Supp. 696, appeal dismissed, 213 N. Y. 700. "The established law in this state is that the negligence of the party who seeks the reformation of an instrument, whether in failing to read the instrument before he signed it or in failing thereafter to note the error for a long period of time, is no bar

to a suit for the reformation of the instrument." *Gilroy v. Strauss Bldg. & Realty Co.*, 157 N. Y. Supp. 162, affirmed without opinion, 172 App. Div. 956, 157 N. Y. Supp. 1126.

⁵⁷ *Paisley v. Casey*, 18 N. Y. Supp. 102, 41 St. Rep. 339.

⁵⁸ *Raby v. Greater N. Y. Development Co.*, 151 App. Div. 72, 135 N. Y. Supp. 813, affirmed without opinion, 210 N. Y. 586.

⁵⁹ *Wilson v. National L. Ins. Co.*, 31 Misc. 403, 65 N. Y. Supp. 550, affirmed without opinion, 56 App. Div. 624, 67 N. Y. Supp. 1150; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235.

⁶⁰ *Welles v. Yates*, 44 N. Y. 525; *Maher v. Hibernia Ins. Co.*, 67 N. Y.

Fraud, as understood in equity jurisprudence, includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and which are injurious to another, or by which an undue and unconscionable advantage is taken of another.⁶¹ Actual fraud is not always essential. Relief may be permitted for "constructive fraud."⁶²

2. Illustrations of fraud.

One may be guilty of fraud such as will justify the reformation of a written instrument, when he knows that the other party to the instrument has fallen into a mistake through inadvertance, and without calling attention to the error seeks to take advantage of it.⁶³ Thus, where a vendor of real property inadvertently reserved a smaller parcel than he intended, and the purchaser knew of the mistake and did not inform the vendor and later sought to obtain the benefit of the mistake, it was held that the contract could be reformed on the ground of fraud.⁶⁴ And, where

283; *Kilmer v. Smith*, 77 N. Y. 226; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451; *Greene v. Smith*, 160 N. Y. 533; *Heert v. Cruger*, 14 Misc. 608, 35 N. Y. Supp. 1063, 70 St. Rep. 688; *Sternback v. Friedman*, 23 Misc. 173, 50 N. Y. Supp. 1025, modified on other grounds, 34 App. Div. 534, 54 N. Y. Supp. 608; *Humphreys v. Hurtt*, 50 How. Pr. 291; *Witthaus v. Schack*, 57 How. Pr. 310; *Brown v. Brown*, 79 Hun 44, 29 N. Y. Supp. 652, 61 St. Rep. 132, affirmed on opinion below, 150 N. Y. 574; *Basserman v. Staten Island Belt Line Co.*, 8 N. Y. Supp. 548, 29 St. Rep. 270. "It is true, that, as a general rule, a court of equity will only interfere to correct a mistake in a written instrument, where it has been mutual, and does not embody the terms as fully understood by both parties; but this rule does not prevail, either where the party against whom the relief is sought has acted in bad faith, or disingenuously, with full apprehension that the instrument did not express

what the other party desired or intended; or, where confidence was reposed in him, and he was entrusted with and assumed the preparation of the instrument, but has, in its preparation, either wilfully or negligently omitted what had been clearly stated to him as the intention of the other party, who, relying on its correctness, and without particular examination of the document, so prepared, incautiously assents to it, under the supposition that it conforms to the verbal terms of the negotiation, as previously agreed upon." *Brioso v. Pacific Mut. Ins. Co.*, 4 Daly 246.

61. *Renz v. Ernst*, 160 N. Y. Supp. 577.

62. *Ulman v. Equitable L. Assur. Soc.*, 161 App. Div. 708, 146 N. Y. Supp. 696, appeal dismissed, 213 N. Y. 700.

63. *Welles v. Yates*, 44 N. Y. 525; *Jamaica Sav. Bank v. Taylor*, 72 App. Div. 567, 76 N. Y. Supp. 790; *Humphreys v. Hurtt*, 50 How. Pr. 291; *Gillett v. Borden*, 6 Lans. 219.

64. *Gillett v. Borden*, 6 Lans. 219.

the grantor of a tract did not reserve the timber thereon according to the intention of the parties, but the grantee concealed the error, it was held that reformation was a proper remedy.⁶⁵ Likewise, where the seller of property received a series of notes as the consideration therefor, the intention of the parties being that all should bear interest, but by mistake two were drawn without interest, and the purchaser purposely abstained from calling the attention of the seller to the fact that such notes were improperly drawn, it was held that the notes could be reformed so as to carry interest.⁶⁶ On the other hand, if there is no relation of confidence or trust between the parties, and no obligation upon a party to speak, fraud is not to be predicated on his silence.⁶⁷

Actual fraud is not necessary where there has been a mistake by one party, and the other party to the contract being indifferent as to who should be the beneficiary of the obligation, has so drawn his promise as to cause it to run in favor of a stranger whom the other party never intended to be benefitted and who has no interest in the promise. In such a case the promisor is bound in conscience to correct the mistake, and his refusal or failure to do so presents a case of constructive fraud within the principles on which jurisdiction to reform written instruments is based.⁶⁸

A party whose duty it is to prepare a written contract in pursuance of a previous agreement, who knowingly prepares and delivers one materially changing the terms of the previous engagement commits a fraud which entitles the other party to relief.⁶⁹ A party who makes no misrepresentation and practices no deceit may ordinarily make as good a bargain as he can. Both parties, in such cases, stand upon their guard and upon common ground, and each must look out for himself. But when a bargain is fairly made and concluded and its terms clearly understood, this rule ceases, and both parties thereafter are bound to exercise good faith

65. *Welles v. Yates*, 44 N. Y. 525.

66. *Botsford v. McLean*, 45 Barb. 478.

67. 154 West 14th St. v. D. A. Schulte, Inc., 121 Misc. 853, 202 N. Y. Supp. 737, affirmed 210 App. Div. 851, 206 N. Y. Supp. 942.

68. *Ulman v. Equitable L. Assur.*

Soc., 161 App. Div. 708, 146 N. Y. Supp. 696, appeal dismissed, 213 N. Y. 700.

69. *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; *Botsford v. McLean*, 45 Barb. 470; *Brown v. Brown*, 79 Hun 44, 29 N. Y. Supp. 652, 61 St. Rep. 132, affirmed on opinion below, 150

in carrying out the contract and executing its provisions. If one party is trusted to reduce the contract to writing he is bound to do it truly, and any variation from it, either by omitting some of its terms, or by inserting provisions not embraced in it, if not known to the other party and distinctly assented to by him, is a clear fraud.⁷⁰ If an assured applies for the renewal of a policy, but the renewal policy contains a clause which is materially different than the former policy to the prejudice of the assured, a reformation may be decreed.⁷¹ Thus, where a mortgagor of property agreed to convey the premises *subject* to the mortgage, but delivered a deed whereby the grantee *assumed* the mortgage, and did not disclose the variance between the deed and the prior engagement of the parties, it was held that the deed was reformable.⁷²

A misrepresentation as to the premises covered by a description in a conveyance may be corrected. Thus, where the agreement between the parties contemplated a mortgage on all of the premises of the mortgagor, and the mortgagor falsely induced the mortgagee to believe that the instrument in question included all of such premises, when in fact, it did not, the description may be reformed.⁷³

A misrepresentation of a material fact may constitute a fraud, which coupled with a mistake of the other party, may authorize relief to the latter in an action of reformation. Thus, where a tenant under a lease about to expire made an agreement with a sub-tenant that on securing a new lease the sub-tenant would pay one-half of the total rental for the premises, but the tenant misrepresented to the sub-tenant the total amount of the new lease, the latter is entitled to maintain an action to reform the written agreement so that it shall express the correct amount of the rent.⁷⁴

A false representation by one party as to the legal effect of a provision in an instrument, or as to the effect of the instrument if it does not contain a certain provision, if thereby the other party is led into error, is a sufficient

N. Y. 574. Compare, *Wayte v Bowker Chemical Co.*, 180 App. Div. 568, 168 N. Y. Supp. 122.

70. *Botsford v. McLean*, 45 Barb. 478.

71. *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235

72. *Kilmer v. Smith*, 77 N. Y. 226.

73. *De Peyster v. Hasbrouck*, 11 N. Y. 582.

74. *Kirtland v. Schanck*, 61 Barb. 348.

ground for a reformation.⁷⁵ Or a false representation of the meaning of a word or expression in a written instrument may afford ground for a reformation. For example, if a purchaser of corporate stock at its "book" or "actual" value, induces the seller to sign an agreement providing for its transfer at "face" value by representing that the words "face value" mean book value or actual value, the agreement may be reformed.⁷⁶

If one about to execute or accept a contract points out a mistake therein, but is prevented from having the same corrected by the acts or declarations of the other party, he may have the error corrected in a suit for reformation.⁷⁷

If one executes an instrument under an assumed name, the name may be corrected.⁷⁸ Where a woman fraudulently contracts a void marriage by misrepresentation of the absence of her former husband, a deed from a third party to her second husband and herself which creates a tenancy by the entirety, may be reformed by striking out her name.⁷⁹

E. Mistake of law.

In many of the earlier cases, the rule is enforced that a mistake of law is not sufficient to justify a reformation of a written instrument.⁸⁰ In other words, a contract would not be reformed because the parties were mistaken as to the legal effect of the instrument.⁸¹ *Ignorantia juris neminem excusat*.⁸² The old rule, however, has been modified to a considerable extent. The rule now enforced is that, if the parties have agreed upon a contract, but in the process of reducing it to a written form, the instrument, by means of a mistake of law, fails to express the contract which the par-

75. *Heert v. Cruger*, 14 Misc. 508, 35 N. Y. Supp. 1063, 70 St. Rep. 688; *Monne v. Ayer*, 20 Jones & S., (52 Super. Ct.) 139.

76. *Frankenberg v. Perlman*, 180 App. Div. 174, 167 N. Y. Supp. 627, affirmed without opinion, 223 N. Y. 673.

77. *Maier v. Hibernia Ins. Co.*, 67 N. Y. 283.

78. *Gotthelf v. Shapiro*, 136 App. Div. 1, 120 N. Y. Supp. 210.

79. *Butler v. Butler*, 93 Misc. 258, 157 N. Y. Supp. 188.

80. *Curtis v. Giles*, 7 Misc. 590, 28 N. Y. Supp. 489, 58 St. Rep. 503; *Arthur v. Arthur*, 10 Barb. 9; *Kent v. Manchester*, 29 Barb. 595; *Garnar v. Bird*, 57 Barb. 277.

81. *Wemple v. Hauenstein*, 19 App. Div. 552, 46 N. Y. Supp. 288; *Trotter v. Brevoort*, 60 App. Div. 562, 69 N. Y. Supp. 1028; *Arthur v. Arthur*, 10 Barb. 9; *Hall v. Reed*, 2 Barb. Ch. 500; *Marsh v. McNair*, 48 Hun 117, 15 St. Rep. 470.

82. *Kent v. Manchester*, 29 Barb. 595.

ties actually entered into, equity will interfere with relief by reformation to the same extent as if the failure was caused by a mistake of fact.⁸³ That is to say, if the written instrument fails to express the intention of the parties, equity will grant relief, although the failure may have resulted from a mistake as to the legal meaning and operation of the terms employed.⁸⁴ This is particularly so, as is frequently the case, when the mistake was made by the draftsman.⁸⁵

A mistake by one of the parties as to the legal effect of the instrument, where such mistake is not induced by the fraud or artifice of the other party, is not a ground for reformation.⁸⁶ Thus, the fact that one of the parties is wrongfully advised by his counsel as to the legal effect of the instrument, affords no ground for relief.⁸⁷ Nor can a mistake of law be corrected, where the correction involves the making of a new contract for the parties in a form not contemplated.⁸⁸ But a mistake of law made by one party, if induced by the fraud or artifice of the other party, is sufficient ground for reformation.⁸⁹

F. Ambiguity.

An action of reformation is not a proper remedy to determine the interpretation to be given to a written instrument.⁹⁰ When an action of reformation fails, the plaintiff is not

83. *Baird v. Erie R. Co.*, 210 N. Y. 225; *Uihlein v. Matthews*, 93 App. Div. 57, 86 N. Y. Supp. 924, affirmed without opinion, 183 N. Y. 563; *Millspaugh v. Cassedy*, 191 App. Div. 221, 181 N. Y. Supp. 276.

84. *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Baird v. Erie R. Co.*, 148 App. Div. 452, 132 N. Y. Supp. 971, affirmed, 210 N. Y. 225; *Marsh v. McNair*, 48 Hun 117, 15 St. Rep. 470; *Everett v. Jones*, 14 N. Y. Supp. 395, 38 St. Rep. 644; *Myer v. Odlewood Assn.*, 146 N. Y. Supp. 469.

85. *Pitcher v. Hennessey*, 48 N. Y. 415; *Bacot v. Fessenden*, 139 App. Div. 647, 124 N. Y. Supp. 370; *Millspaugh v. Cassedy*, 191 App. Div. 221, 181 N. Y. Supp. 276; *Goldsmith v. Union Mutual L. Ins. Co.*, 18 Abb. N. C. 325;

Myer v. Idlewood Assn. 146 N. Y. Supp. 469. Compare, *Halbe v. Adams*, 176 App. Div. 588, 163 N. Y. Supp. 895.

86. *Miller v. Carpenter*, 68 App. Div. 346, 74 N. Y. Supp. 231; *Pennell v. Wilson*, 2 Rob. 505.

87. *Garnar v. Bird*, 57 Barb. 277.

88. *Leavitt v. Palmer*, 3 N. Y. 19; *Garnar v. Bird*, 57 Barb. 277; *Hall v. Reed*, 2 Barb. Ch. 500.

89. *Heert v. Cruger*, 14 Misc. 508, 35 N. Y. Supp. 1063, 10 St. Rep. 688.

90. *Oakville v. Double-Pointed Tack Co.*, 105 N. Y. 658; *Husted v. Van Ness*, 1 App. Div. 120, 36 N. Y. Supp. 1043, 72 St. Rep. 28, affirmed, 158 N. Y. 104; *Voci v. Page*, 123 Misc. 766, 206 N. Y. Supp. 128.

entitled to a decree determining that the instrument is to be judicially construed to mean the same as if it had been reformed as he wished.⁹¹

ARTICLE III.

INSTRUMENTS REFORMABLE.

A. In general.

Subject to few exceptions, any written instrument constituting a contract is reformatable when proper equitable grounds are presented. Executed, as well as executory, contracts are subject to this branch of equitable relief.⁹² In an early case an award of arbitrators was reformed where it inadvertently contained an erroneous description of premises.⁹³ In an extreme case, the courts have extended the remedy so as to decree the reformation of the articles of incorporation of a business corporation.⁹⁴ On the other hand, the remedy is not available for the correction of book entries which can be explained in an action at law.⁹⁵

A settlement between partners on the withdrawal of a member of the firm, which is founded upon a mistake of their bookkeeper in stating the assets and liabilities of the firm, may be reformed, although the parties have executed mutual general releases.⁹⁶

B. Deeds.

1. In general.

Relief in an action of reformation is not limited to executory contracts, but executed contracts, such as deeds, may, in proper cases, be reformed.⁹⁷ The fact that the deed was a gift does not preclude a reformation.⁹⁸ But, as in other cases, the relief is granted only when there has been a mutual mistake of the parties, or the mistake of one party

91. *Oakville v. Double Pointed Tack Co.*, 105 N. Y. 658; *Husted v. Van Ness*, 158 N. Y. 104.

92. *Paine v. Upton*, 87 N. Y. 327.

93. *Bouck v. Wilber*, 4 Johns. Ch. 405.

94. *Millsbaugh v. Cassedy*, 191 App. Div. 221, 181 N. Y. Supp. 276.

95. *Kosovits v. N. Y. First Hungarian, etc., Soc.*, 130 N. Y. Supp. 72.

96. *House v. Wechsler*, 124 App. Div. 124, 93 N. Y. Supp. 593.

97. *Matteson v. Johnston*, 139 App. Div. 859, 124 N. Y. Supp. 185; *Brown v. Brown*, 79 Hun 44, 29 N. Y. Supp. 652, 61 St. Rep. 132, affirmed on opinion below, 150 N. Y. 574.

98. *Matteson v. Johnston*, 139 App. Div. 859, 124 N. Y. Supp. 185.

coupled with the fraud of the other party.⁹⁹ As a general rule, a mistake of law will afford no ground for relief,¹ but this principle is subject to exceptions.² If the instrument carries out the actual agreement of the parties, and the case is devoid of fraud, oppression, or other infirmative considerations, reformation is not to be had.³ Thus, if the deed corresponds with executory contract for the conveyance of the premises, and no attack is made on the executory contract, the deed will not be reformed.⁴

2. Description of premises.

In a proper case, a court of equity clearly has power to reform a deed by changing the description of the premises.⁵ The remedy is available where a mutual mistake has been made as to a course or a distance.⁶ If the deed by mistake includes premises not intended to be conveyed, reformation is a proper remedy.⁷ The grantor may have relief in such a case, although the deed was drawn in accordance with his instructions, where he was honestly mistaken as to the boundaries.⁸ But, if the premises conveyed are those which the grantee intended to purchase, and the grantee is guilty of no unfair conduct, the grantor is not entitled to a reformation on the ground that the deed conveys more premises than he intended to convey, for in such a case the mistake is not mutual.⁹ If it was the intention of the parties that a parcel,¹⁰ a timber right,¹¹ or an easement, should

99. See, *supra*, II, Grounds for Reformation.

1. Trotter v. Brevoort, 60 App. Div. 562, 69 N. Y. Supp. 1028; Arthur v. Arthur, 10 Barb. 9.

2. See, *supra*, II-B, Mistake of Law.

3. Christianson v. Linford, 3 Rob. (26 Super. Ct.) 215.

4. Christianson v. Linford, 3 Rob. (26 Super. Ct.) 215; Kilmer v. Smith, 11 Jones & S. (43 Super. Ct.) 461, affirmed, 77 N. Y. 226.

5. Johnson v. Taber, 10 N. Y. 319; Bush v. Hicks, 60 N. Y. 298; Penfield v. Village of New Rochelle, 18 App. Div. 83, 45 N. Y. Supp. 460, affirmed on opinion below, 160 N. Y. 697; Knobloch v. Kracke, 151 App. Div. 19, 135 N. Y. Supp. 381; Brennan v.

Thompson, 46 Misc. 317, 94 N. Y. Supp. 684; Knowles v. McCamly, 10 Paige 342.

6. Brennan v. Thompson, 46 Misc. 317, 94 N. Y. Supp. 684.

7. Johnson v. Taber, 10 N. Y. 319; Bush v. Hicks, 60 N. Y. 298.

8. Johnson v. Taber, 10 N. Y. 319.

9. Stolzky v. Linschied, 150 App. Div. 253, 134 N. Y. Supp. 805. The remedy of the vendor in such a case is an action of rescission. See the chapter on Rescission.

10. Gillett v. Borden, 6 Lans. 219.

Fraud of grantee.—Where, on contracting to convey a piece of land, the vendor intended to reserve a strip of a certain width, but, through inadvertence, signed a contract with reser-

have been excepted from the premises conveyed, the deed may be reformed so as to express the intention of the parties. If the description includes the whole of a parcel instead of one-half thereof intended to be conveyed, a proper case may be presented for reformation.¹² Or, if a parcel or a part of the premises intended to be conveyed is omitted from the description, the deed may be reformed.¹³

An error in the omission or in the insertion of words is not the only ground for reformation.¹⁴ Although the parties understand what language was contained in the deed, if they believed that the description corresponded with the actual boundaries of the land intended to be conveyed, and were mistaken, the mistake is one of fact, and the instrument may be reformed.¹⁵ If there is annexed to the deed a correct sketch or map of the premises conveyed, but the description of the premises as inserted in the deed is erroneous, the written description may be reformed so as to correspond with the sketch or map.¹⁶

3. Acreage.

The courts have had some difficulty with cases where the premises conveyed were correctly described as to boundaries, but such boundaries do not comprise the acreage stated in the deed. If the grantee has purchased the premises at a definite price per acre, a mistake in acreage clearly justifies a reformation in that respect with a corresponding modification of the purchase price.¹⁷ If, on the other hand, the premises were purchased at a fixed price for the entire tract, not at a price per acre, the courts have refused relief.¹⁸

vation of a smaller strip, and the vendee knew the mistake, did not inform the vendor of it, but attempted to obtain the benefit of it, it was held that the act of the vendee was fraudulent, and the contract could be reformed on the ground of fraud. *Gillett v. Borden*, 6 *Lans.* 219.

11. *Welles v. Yates*, 44 *N. Y.* 525.

12. *Knobloch v. Kracke*, 151 *App. Div.* 19, 135 *N. Y. Supp.* 381.

13. *Lamb v. Schiefner*, 129 *App. Div.* 684, 114 *N. Y. Supp.* 34; *Beatty v. Ireland*, 152 *App. Div.* 538, 137 *N. Y. Supp.* 456; *Crippen v. Baumes*, 15 *Hun*

136; *Webb v. Morrison*, 37 *N. Y. Supp.* 449, 72 *St. Rep.* 720, affirmed without opinion, 157 *N. Y.* 712.

14. *Bush v. Hicks*, 60 *N. Y.* 298.

15. *Bush v. Hicks*, 60 *N. Y.* 298; *Titus v. Perry*, 13 *St. Rep.* 237.

16. *Kiernan v. Schreib*, 165 *N. Y. Supp.* 638, affirmed without opinion, 166 *App. Div.* 908, 150 *N. Y. Supp.* 1092.

17. *Arend v. Laing*, 79 *Hun* 203, 29 *N. Y. Supp.* 537, 61 *St. Rep.* 214.

18. *Coast v. McCaffery*, 46 *App. Div.* 436, 61 *N. Y. Supp.* 881; *Moffett v. Jaffe*, 132 *App. Div.* 7, 116 *N. Y. Supp.*

It is difficult to sustain any other rule, where buildings or valuable improvements are upon part of the premises, or where there is a large variation in the value of different parts of the premises.¹⁹ However, in a comparatively recent case in the Court of Appeals it has been held that the relief may be granted, where the premises consist of unimproved farm land and woodland, although the premises were purchased in gross.²⁰ The view of the Court of Appeals must probably be limited to cases where apparently all the lands conveyed were of practically the same value, for in later cases the court has affirmed determinations denying relief where the premises were purchased for a gross sum.²¹

In this class of cases, relief is not denied to a purchaser because he has examined the boundaries of the premises,²² nor because the deed contains the words "more or less" after the statement of the acreage, where the discrepancy in acreage is substantial.²³

4. Estate conveyed.

If, through mistake or fraud, one has conveyed a greater or less estate in certain premises than was in the actual contemplation of the parties, equity may afford relief.²⁴ Thus, relief may be granted where the grantor has conveyed a fee instead of the life estate intended; or where a life estate only has been conveyed when the parties had agreed for the conveyance of the fee; or where a fee has been conveyed when the parties contemplated the conveyance of a reversion after the expiration of a life estate in favor of the grantor.²⁵

402; *Sweet v. Marsh*, 133 App. Div. 315, 117 N. Y. Supp. 930; *Ireland v. Baylis*, 188 App. Div. 981, 176 N. Y. Supp. 904; *Marvin v. Bennett*, 26 Wend. 169.

Rescission.—If through the fraud of the grantor or the mistake of the grantee, the latter is misled as to the acreage of the premises he has a remedy in an action of Rescission. See the Chapter on Rescission.

19. *Street v. Marsh*, 133 App. Div. 315, 117 N. Y. Supp. 930.

20. *Mills v. Kampfe*, 202 N. Y. 46. And see, *Paine v. Upton*, 87 N. Y. 327.

21. *Bishop v. Potter*, 166 App. Div. 890, affirmed without opinion, 221 N. Y. 557; *Hunt v. Wall*, 211 App. Div. 856, 206 N. Y. Supp. 869, affirmed, 240 N. Y. 696.

22. *Paine v. Upton*, 87 N. Y. 327; *Mills v. Kampfe*, 202 N. Y. 46.

23. *Paine v. Upton*, 87 N. Y. 327; *Mills v. Kampfe*, 202 N. Y. 46.

24. *Delap v. Leonard*, 189 App. Div. 57, 178 N. Y. Supp. 102; *Wright v. Delafield*, 23 Barb. 498.

25. *Schrieber v. Goldsmith*, 39 Misc. 381, 79 N. Y. Supp. 846.

5. Assumption of mortgage.

A clause in a deed whereby the grantee has assumed the payment of a mortgage on the premises, if it was inserted through the mutual mistake of the parties or through the fraud of the grantor, may be stricken out.²⁶ The grantee in such a case may be relieved from liability on the expressed covenant.

If the clause relating to the mortgage is in accordance with the prior executory contract of the parties, relief is not to be granted, unless a successful attack is made on the executory contract also.²⁷ Or, if the assumption clause is in accordance with the intention of the parties and there is no fraud or oppression involved in the transaction, the clause will not be stricken from the deed merely because the grantee did not understand the liability he was thereby assuming.²⁸ The relief in some cases may be granted as against an assignee of the mortgage.²⁹

6. Parties.

If it was intended that premises were to be conveyed to two or more persons, but by mistake the names of one of the grantees is omitted, the deed may be reformed in this respect.³⁰ Thus, if it was intended to vest premises in a husband and his wife as tenants by the entirety, but by mistake the name of one is omitted, the deed may be reformed.³¹ But, if the deed is drawn according to the intention of the grantor, it has been thought that, in the absence of fraud, it cannot be reformed.³² But in the case of fraud, whereby a man is induced to enter into a void marriage ceremony with a woman, the husband can maintain an action to reform a deed conveying property to them as tenants by

26. *Kilmer v. Smith*, 77 N. Y. 226; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40; *Arnstein v. Bernstein*, 127 App. Div. 500, 111 N. Y. Supp. 987; *Real State T. Co. v. Balch*, 13 Jones & S. (45 Super. Ct.) 528; *Renz v. Ernst*, 160 N. Y. Supp. 577.

27. *Kilmer v. Smith*, 11 Jones & S. (43 Super. Ct.) 461, affirmed, 77 N. Y. 226.

28. *Banney v. McMullen*, 5 Abb. N. C. 246.

29. See, *infra*, V-A-3, Parties-Purchasers in good faith.

30. *Mastin v. Mastin*, 1 N. Y. Supp. 746, 17 St. Rep. 625.

31. *Mastin v. Mastin*, 1 N. Y. Supp. 746, 17 St. Rep. 625; *Dunworth v. Dunworth*, 13 N. Y. Supp. 489, 37 St. Rep. 905.

32. *Dressler v. Mulhern*, 77 Misc. 476, 136 N. Y. Supp. 1049.

the entirety by striking out her name, without even making the grantor a party.³³

7. Restrictive covenants.

If through the mutual mistake of the parties or through the mistake of one party and the fraud of the other party, a deed fails to carry out the agreement of the parties in respect to the inclusion or exclusion of a restrictive covenant as to the use of the premises, equity will afford relief in an action of reformation.³⁴ But, in the absence of fraud, such relief will not be granted if the instrument was in accordance with the intention of the defendant.³⁵

8. Deed given pursuant to judicial sale.

Although some of the earlier cases indicate a contrary rule,³⁶ it is now established that an action in equity may be maintained to correct a sheriff's deed.³⁷ Likewise, in a proper case, a referee's deed made in foreclosure proceedings may be reformed.³⁸

C. Executory contracts for sale of lands.

Under the same circumstances that a deed is reformatory, an executory contract for the sale of land may be reformed in an equitable action.³⁹ Thus, if the premises to be conveyed are incorrectly described, an appropriate change may be made.⁴⁰ If the contract includes only a part of the lands which the purchaser supposed he was buying, of which fact he was ignorant, but which the vendor knew, it will be reformed so as to conform to the agreement of the parties.⁴¹

33. *Butler v. Butler*, 93 Misc. 258, 157 N. Y. Supp. 188.

34. *Uihlein v. Matthews*, 93 App. Div. 57, 86 N. Y. Supp. 924, affirmed without opinion, 183 N. Y. 563.

35. *Raby v. Greater N. Y. Development Co.*, 151 App. Div. 72, 135 N. Y. Supp. 813, affirmed without opinion, 210 N. Y. 586.

36. *Laub v. Buckmiller*, 17 N. Y. 620; *Mason v. White*, 11 Barb. 173.

37. *Bartlett v. Judd*, 21 N. Y. 200; *Butler v. Clark*, 29 Abb. N. C. 413, 66 Hun 444, 21 N. Y. Supp. 415, 50 St. Rep. 133, affirmed, 142 N. Y. 636. See

also, *De Riemer v. Cantillon*, 4 Johns. Ch. 85.

38. *Garth Estates v. Bronx Parkway Commission*, 177 App. Div. 6, 163 N. Y. Supp. 950; *Feil v. Feil*, 191 App. Div. 840, 182 N. Y. Supp. 280.

39. *Isaacs v. Schmuck*, 218 App. Div. 516, 194 N. Y. Supp. 155; *Voci v. Page*, 123 Misc. 766, 206 N. Y. Supp. 128. See also, *Donovan v. Weppner*, 131 Misc. 903, 228 N. Y. Supp. 473.

40. *White v. Williams*, 48 N. Y. 344; *Jamaica Sav. Bank v. Taylor*, 72 App. Div. 567, 76 N. Y. Supp. 790.

41. *Webb v. Morrison*, 37 N. Y. Supp.

The contract may be reformed as against an assignee thereof, as the assignee takes it subject to the equities between the original parties.⁴²

As in cases of other forms of contracts, the relief cannot be granted except on a showing of mutual mistake or of the mistake of one party and the fraud of the other.⁴³ A contract for the sale of real property will not be reformed at the suit of the vendor by writing into the contract, over the protest of the vendee, covenants and agreements which the vendor knew were not in it at the time of its execution and which were deliberately omitted therefrom.⁴⁴

D. Notes.

Informal, as well as formal, instruments may be corrected where they erroneously express the intention of the parties. Thus, in a proper case, a promissory note may be reformed. The fact, that, if the note is negotiable in form, it may possibly be transferred to a holder in due course who can enforce it according to its terms, may present a ground for reformation which applies with peculiar force to a court of equity.⁴⁵ Thus, a note which in terms provides for its payment in cash, may be shown to have been intended to be payable in services or commodities.⁴⁶ Or, if it was intended that a note should carry interest, but it fails to express that part of the agreement, it may be reformed accordingly.⁴⁷

E. Bonds.

If sufficient equitable grounds exist, a bond may be reformed. Thus, where a declaration of trust recited that a bond of indemnity was to be given, and it was clear that it was intended that the bond should contain a condition as to the payment of certain amounts when adjusted, but it

449, 72 St. Rep. 720, affirmed without opinion, 157 N. Y. 712.

42. *Jamaica Sav. Bank v. Taylor*, 72 App. Div. 567, 76 N. Y. Supp. 790.

43. *Isaacs v. Schmuck*, 245 N. Y. 77; *Raby v. Greater N. Y. Development Co.*, 151 App. Div. 72, 135 N. Y. Supp. 813, affirmed without opinion, 210 N. Y. 586; *Charles Albert Co. v. Newtown Creek Realty Corp.*, 211 App. Div. 1, 206 N. Y. Supp. 673.

44. *McCauley v. Brooklyn Steam*

Marble Co., 190 App. Div. 595, 180 N. Y. Supp. 365.

45. *MacGowan v. Gein*, 13 St. Rep. 421, 28 Week. Dig. 81, affirmed without opinion, 122 N. Y. 643.

46. *MacGowan v. Gein*, 13 St. Rep. 421, 28 Week. Dig. 81, affirmed without opinion, 122 N. Y. 643.

47. *Botsford v. McLean*, 45 Barb. 478; *Bayrhoff v. Rohde*, 16 N. Y. Supp. 851.

did not so state, a reformation of the instrument upon the ground of mutual mistake is proper.⁴⁸ But the omission of the penalty of a bond does not affect its validity, and, in order to be actionable, it need not be reformed in this respect.⁴⁹

F. Mortgages.

A mortgage, which, by reason of the mutual mistake of the parties or the mistake of one party coupled with the fraud of the other party, fails to express the true engagement of the parties, is reformatable in equity.⁵⁰ But, in the absence of such equitable grounds, the relief cannot be granted.⁵¹ Thus, in a proper case, a reformation may be had of the clauses relating to the terms of payment,⁵² the note or other obligation secured by the mortgage,⁵³ the description of the property covered thereby,⁵⁴ or the personal liability of the mortgagor.⁵⁵ If the mortgagor signs the instrument under an assumed name, it may be corrected so as to express his true name.⁵⁶

Relief may be granted against an assignee of the mortgage, for the assignee takes no better title than that of his assignor.⁵⁷ But the right to have a mortgage reformed is subject to the rights acquired under a mechanic's lien filed after the recording of the mortgage.⁵⁸

48. *Darmour v. Chapman*, 2 App. Div. 112, 37 N. Y. Supp. 674, 73 St. Rep. 255.

49. *McManus v. Harrigan*, 41 Misc. 615, 85 N. Y. Supp. 220.

50. *Simpkins v. Taylor*, 81 Hun 467, 31 N. Y. Supp. 169, 63 St. Rep. 491.

Savings and Loan Companies.—A mortgage given to a savings and loan company will not be reformed at the suit of the mortgagor where the relief prayed for would, if granted, require the payment to the mortgagor of a dividend in excess of the rate allowed by statute. *Miller v. Eagle Sav. & L. Co.*, 174 App. Div. 581, 161 N. Y. Supp. 326.

51. *Trust Co. of N. Y. v. Universal Talking Machine Co.*, 90 App. Div. 207,

86 N. Y. Supp. 60; *Davenport v. Holbert*, 131 Misc. 511.

52. *Andrews v. Gillespie*, 47 N. Y. 487.

53. *Prior v. Williams*, 2 Abb. Ct. App. Dec. 624, 2 Keyes 530, 3 Keyes 231.

54. *De Peyster v. Hasbrouck*, 11 N. Y. 582; *Crippen v. Baumes*, 15 Hun 136. See also, *Schwartz v. Rappaport*, 115 Misc. 227, 187 N. Y. Supp. 611.

55. *Carvalho v. Sudderly*, 169 App. Div. 652, 155 N. Y. Supp. 413.

56. *Gotthelf v. Shapiro*, 136 App. Div. 1, 120 N. Y. Supp. 210.

57. *Andrews v. Gillespie*, 47 N. Y. 487.

58. *Schwartz v. Rappaport*, 115 Misc. 227, 187 N. Y. Supp. 611.

G. Leases.

A proper case being shown for equitable intervention, a written lease may be reformed in an action for that purpose.⁵⁹ Thus, if an error has been made in the description of the demised premises, equitable relief is proper.⁶⁰ A lease may also be corrected if it erroneously states the amount of rent.⁶¹ If the rental is fixed at a price per square foot, an incorrect statement of the number of square feet leased may be corrected.⁶² If the landlord agreed to furnish heat and hot water to the rooms rented, but the written lease fails to contain clauses to that effect, the lease may be reformed.⁶³

H. Sales.

A bill of sale or a written agreement for the sale of personal property may be reformed by the courts, if the instrument was the result of mutual mistake of the parties or the mistake of one party and the fraud of the other party. In the absence of such a mistake, there is no remedy in an action of reformation. Mere proof that the defendant promised orally that the written contract would contain a provision in one way, and that the contract when presented and thereupon executed contained that provision in a different way, more stringent against the plaintiff, does not justify a reformation of such a contract upon the theory that there was a mistake by the plaintiff and a fraud by the defendant.⁶⁴ When a proper case is presented, a court of equity will reform an agreement for the transfer of stock or securities.⁶⁵ An agreement for the transfer of stock at "face value" may be reformed, where the actual agreement between the parties was that the stock should be transferred at book or actual value and the execution of the contract is induced by the representation that "face value" means the

59. *Heert v. Cruger*, 14 Misc. 508, 35 N. Y. Supp. 1063, 70 St. Rep. 688; *Monne v. Ayer*, 20 Jones & S. (52 Super. Ct.) 139; *Ranalli v. Zeppetelli*, 94 N. Y. Supp. 561.

60. *Newcomb v. Kitteltas*, 19 Barb. 608.

61. *Kirtland v. Schanck*, 61 Barb. 348.

62. *Kass v. Garment Center Realty*

Co., 209 App. Div. 647, 205 N. Y. Supp. 94.

63. *Manheimer v. Kuhn*, 173 App. Div. 135, 159 N. Y. Supp. 437.

64. *Wayte v. Bowker Chemical Co.*, 180 App. Div. 568, 168 N. Y. Supp. 122.

65. *Portugal v. Reisman*, 192 App. Div. 492, 133 N. Y. Supp. 190.

same as book or actual value.⁶⁶ An agreement for the transfer of a patent may be reformed where it fails to express the intention of the parties.⁶⁷ Where the parties to a contract for the sale of iron intended to contract for a certain number of tons gross weight, but the written contract fails to indicate that anything was intended other than the ton of 2000 pounds, the contract may be reformed.⁶⁸ A court of equity in a proper case has power to reform a written agreement, to give full and complete relief, even to the insertion of the names of parties in such agreement, where all the parties interested are before the court and no rights of innocent persons are affected.⁶⁹

I. Construction contracts.

Construction contracts are subject to reformation in the same manner as other contracts.⁷⁰ In case of a mutual mistake of the parties, a contract for the construction of a building of a prescribed size may be reformed so as to modify the size of the structure.⁷¹ A contractor who entered into an agreement with a wrecking company to demolish certain buildings and clear the premises, which company, after getting possession of all the buildings intended to be covered by the contract, removed all the materials of value therein, and refused to complete the contract upon the ground that they did not get possession of certain houses which they knew had been included in the contract by mistake, may sue in equity for a reformation of the contract.⁷²

J. Contracts of suretyship or indemnity.

Although the contracts of a guarantor or surety are *strictissimi juris*, nevertheless they may in some cases be reformed.⁷³ But, in the absence of fraud, the security may not

66. Frankenberg v. Perlman, 180 App. Div. 174, 167 N. Y. Supp. 627, affirmed without opinion, 223 N. Y. 673.

67. Cortland Howe Ventilating Stove Co. v. Howe, 92 Hun 113, 36 N. Y. Supp. 701, 71 St. Rep. 766.

68. Many v. Beekman Iron Co., 9 Paige 188.

69. Portugal v. Reisman, 192 App. Div. 492, 183 N. Y. Supp. 190.

70. Friedman Marble & Slate Works

v. Whitecomb, 186 App. Div. 509, 174 N. Y. Supp. 531; Basserman v. Staten Island Belt Line Co., 8 N. Y. Supp. 548, 29 St. Rep. 270.

71. Caswell v. West, 3 T. & C. 383.

72. Eidlitz v. Manhattan Wrecking & Contracting Co., 164 App. Div. 591, 150 N. Y. Supp. 307.

73. Prior v. Williams, 2 Abb. Ct. App. Dec. 624, 2 Keyes 530, 3 Keyes 231; Simpkins v. Taylor, 81 Hun 467, 31 N. Y. Supp. 169, 63 St. Rep. 491.

be reformed on the ground of mistake, unless the mistake was mutual.⁷⁴

The designation of a party may be changed where it is incorrect.⁷⁵ An instrument which on its face is a guaranty of the collection of a bond and mortgage, may be reformed so as to guarantee the payment thereof.⁷⁶ In a proper case, even the amount of the security may be modified. Thus, where an undertaking was executed and delivered in blank with the understanding that the blanks should be filled so as to limit the liability of the surety to a certain amount, but without fraud and by mistake the blanks were filled so as to increase the liability, it was held that the instrument could be reformed so as to express the actual agreement.⁷⁷

K. Insurance policies.

1. In general.

When, through the mistake of the parties, or through the mistake of the insured and the fraud of the insurance company, a policy of insurance does not correspond with the intentions of the parties, an action may be maintained in equity to reform the policy, and to recover on it as reformed.⁷⁸ In a proper case, the company may have the

74. *Lanier v. Wyman*, 5 Rob. 147.

75. *Clute v. Knies*, 102 N. Y. 377.

76. *Sinapkins v. Taylor*, 81 Hun 467, 31 N. Y. Supp. 169, 63 St. Rep. 491.

77. *Bindseil v. Federal Union Surety Co.*, 130 App. Div. 775, 115 N. Y. Supp. 447.

78. *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263; *Van Tuyl v. Westchester F. Ins. Co.*, 55 N. Y. 657; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451; *Steinbach v. Prudential Ins. Co.*, 172 N. Y. 471; *McCoubrey v. St. Paul, etc., Ins. Co.*, 50 App. Div. 416, 64 N. Y. Supp. 112, affirmed without opinion, 169 N. Y. 590; *Hunt v. Provident Sav. L. Assur. Soc.*, 77 App. Div. 338, 79 N. Y. Supp. 74; *Le Gendre v. Scottish Union, etc., Ins. Co.*, 95 App. Div. 562, 88 N. Y. Supp. 1012; *Schuessler v. Fire Ins. Co. of Philadelphia*, 103 App. Div. 12, 92 N. Y. Supp. 649, affirmed without opinion, 185 N. Y.

578; *Lake View Brewing Co. v. Commerce Ins. Co.*, 143 App. Div. 665, 128 N. Y. Supp. 337, affirmed without opinion, 207 N. Y. 746; *Ulman v. Equitable L. Assur. Soc.*, 161 App. Div. 703, 146 N. Y. Supp. 696, appeal dismissed, 213 N. Y. 700; *Coe v. London & Lancashire F. Ins. Co.*, 184 App. Div. 604, 172 N. Y. Supp. 435; *Houlden v. Farmers' Alliance Co-op. F. Ins. Co.*, 188 App. Div. 734, 177 N. Y. Supp. 286, affirmed, 231 N. Y. 636; *Schenectady Varnish Co. v. Automobile Ins. Co.*, 127 Misc. 751, 217 N. Y. Supp. 504; *Hamilton v. Fidelity & C. Co.*, 171 N. Y. Supp. 580; *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige 278.

Party to contract.—In a proper case, one not a party to the contract of insurance, who claims that the contract was in fact made with him, may have the policy reformed accordingly. *Hamilton v. Fidelity & C. Co.*, 171 N. Y. Supp. 580.

policy reformed so as to express the actual agreement of the parties.⁷⁹

As in other actions of reformation, the proof of the mistake or fraud must be clear and convincing.⁸⁰ If there is no mistake or fraud on the part of the company or its representatives, the action cannot be maintained by the assured.⁸¹ If the minds of the parties never met as to the terms of the policy, it cannot be reformed, for the court is without power to make a new contract for the parties.⁸² The assured is bound to show that it was the intention of the company as well as of himself to have the policy read as he seeks to have it. To warrant a reformation, the minds of the parties must have met in a contract and through a mistake that intent failed of expression.⁸³ In the absence of fraud, if the contract reads strictly according to the intent of the company, it cannot be reformed.⁸⁴

The fact that the insured has failed to examine the policy and does not discover the mistake until after a loss, does not bar the action against the company.⁸⁵ The failure sooner to discover the situation is but a circumstance to be taken

79. *Metropolitan L. Ins. Co. v. Trilling*, 194 App. Div. 178, 184 N. Y. Supp. 898.

80. *Lake View Brewing Co. v. Commerce Ins. Co.*, 143 App. Div. 665, 128 N. Y. Supp. 337, affirmed without opinion, 207 N. Y. 746; *Miaghan v. Hartford F. Ins. Co.*, 12 Hun 321; *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige 278. See, *infra*, VI-C, Sufficiency of evidence.

81. *Salomon v. North British, etc., Ins. Co.*, 215 N. Y. 214; *Geiger Watch Case Corp. v. Fidelity & Deposit Co.*, 120 Misc. 441, 199 N. Y. Supp. 555; *Silver Fox Co. v. New York Indemnity Co.*, 125 Misc. 430, 210 N. Y. Supp. 18; *Wright v. American Equitable Assur. Co.*, 131 Misc. 215, 225 N. Y. Supp. 470; *McHugh v. Imperial F. Ins. Co.*, 48 How. Pr. 230; *Miaghan v. Hartford F. Ins. Co.*, 12 Hun 321.

82. *Kenyon Paper Co. v. Nederlandsche Lloyds*, 124 App. Div. 886, 109 N. Y. Supp. 311; *New York Ice Co. v. North Western Ins. Co.*, 31 Barb.

72. And see, *supra*, I-G. Court not to make new contract.

83. *Bryce v. Lorillard F. Ins. Co.*, 55 N. Y. 240; *Mead v. Westchester F. Ins. Co.*, 64 N. Y. 453; *Salomon v. North British, etc., Ins. Co.*, 215 N. Y. 214; *Metzger v. Aetna Insurance Co.*, 227 N. Y. 411; *London Assur. Corp. v. Thompson*, 22 App. Div. 64, 47 N. Y. Supp. 830; *Kenyon Paper Co. v. Nederlandsche Lloyds*, 124 App. Div. 886, 109 N. Y. Supp. 311; *Fort v. Globe, etc., Ins. Co.*, 102 Misc. 584, 169 N. Y. Supp. 229; *McHugh v. Imperial F. Ins. Co.*, 48 How. Pr. 230; *Miaghan v. Hartford F. Ins. Co.*, 12 Hun 321.

84. *Bryce v. Lorillard F. Ins. Co.*, 55 N. Y. 240; *Metzger v. Aetna Ins. Co.*, 227 N. Y. 411; *Geiger Watch Case Corp. v. Fidelity & Deposit Co.*, 120 Misc. 441, 199 N. Y. Supp. 555; *Wright v. American Equitable Assur. Co.*, 131 Misc. 215, 225 N. Y. Supp. 470.

85. *Van Tuyl v. Westchester F. Ins. Co.*, 55 N. Y. 657; *Lewitt & Co., Inc. v. Jewelers' Safety F. Soc.*, 249 N. Y.

into consideration in weighing the testimony and determining whether a mistake has been made.⁹⁰

2. Life insurance.

In accordance with the general principles relating to the reformation of written instruments, a life insurance policy may be reformed by a court of equity.⁹¹ The failure of the insurance agent to obey the positive instructions of the applicant as to the form of the policy may constitute a constructive fraud which will afford ground for reformation.⁹² Where a wife is induced to exchange a policy on her husband's life for an endowment policy on the agreement of the company's agent that the new policy would bear the same date as the old one, on her discovery that the new policy bore a later date, she is entitled to a reformation of the policy.⁹³ If by the mutual mistake of the company and the applicant for the insurance, the beneficiary is not correctly named, the policy may be reformed in this respect.⁹⁴ In an action of reformation wherein the plaintiff establishes his right as beneficiary of the policy, he may be also allowed to recover on the policy.⁹⁵ Thus, if the policy is payable to

217; *D. R. Paskie & Co., Inc. v. Commercial Casualty Ins. Co.*, 223 App. Div. 603, 229 N. Y. Supp. 121.

90. *Van Tuyl v. Westchester F. Ins. Co.*, 55 N. Y. 657.

91. **Premature action.**—The holder of an insurance policy cannot maintain a suit to have it adjudged that upon his death after a certain date the insurer cannot deduct the amount of his certificate of indebtedness from the amount payable under his policy which, it is alleged, the insurer intends to do, or that upon said date he is entitled to have the certificate canceled, where he admits that if he dies before said date the insurer may lawfully deduct the amount of the certificate from the amount payable under the policy and alleges only an oral agreement by which upon his surviving said date the certificate was to be canceled. Such suit for equitable relief is premature, being founded merely upon an anticipated breach of the oral agreement.

Dunston v. Security Mutual, etc., Co., 152 App. Div. 264, 136 N. Y. Supp. 674.

Laches.—In some cases, the delay of the plaintiff in seeking the relief may influence the court in dismissing the action. *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451. And see, *supra*, IV-B-2, **Laches**.

92. *Ulman v. Equitable L. Assur. Soc.*, 161 App. Div. 708, 146 N. Y. Supp. 696.

93. *Anderson v. Metropolitan L. Ins. Co.*, 18 Week. Dig. 192.

94. *Steinbach v. Prudential Ins. Co.*, 62 App. Div. 133, 70 N. Y. Supp. 809, reversed on other grounds, 172 N. Y. 471; *Goldsmith v. Union Mutual L. Ins. Co.*, 18 Abb. N. C. 325.

95. *Steinbach v. Prudential Ins. Co.*, 62 App. Div. 133, 70 N. Y. Supp. 809, reversed on other grounds, 172 N. Y. 471; *Hunt v. Provident Sav. L. Assur. Soc.*, 77 App. Div. 338, 79 N. Y. Supp. 74.

the "heirs" of the insured, it may be reformed so as to be payable to his "children."⁹⁶ If the policy is payable to the wife of the assured, and it was the intention of the parties that she should be the beneficiary only in case she was his wife at the time of his death, and it appears he has secured a divorce from her on the ground of adultery, the policy will be reformed.⁹⁷ Where the wife of the assured secures an endowment policy for her sole benefit and it was the intention of the parties that she should have the sole benefit of the policy, she is entitled to a reformation so as to eliminate a clause making the policy payable to her husband in case he survives the endowment period.⁹⁸

Equity will not reform a policy, for fraud upon the insured where the fraud was practiced by one who never was an agent of the insurer and where the latter never knew of or ratified the fraud.⁹⁹

A life insurance company is entitled to have a policy reformed to show the true age of the insured and the amount of insurance which the premium actually charged would buy at the true age and also the guaranteed loan values and surrender options corrected, where, by mutual mistake, the age of the insured was stated in the policy at less than his true age and on discovery of the mistake the company requested the insured and the beneficiary to reform the policy so as to state the true agreement of the parties.¹

3. Fire insurance.

In a case appealing to the conscience of an equity court, a fire insurance policy may be reformed, and the insured may be allowed in the same action to recover upon the policy as reformed.² If an assured seeks a renewal of his policy, made according to the terms of the former policy, but the new policy is materially different, it may be reformed, for

96. *Hadley v. Travelers' Ins. Co.*, 68 Misc. 359, 125 N. Y. Supp. 88.

97. *Goldsmith v. Union Mutual L. Ins. Co.*, 13 Abb. N. C. 325.

98. *Ulman v. Equitable L. Assur. Soc.*, 161 App. Div. 708, 146 N. Y. Supp. 696, appeal dismissed, 213 N. Y. 700.

99. *Wilson v. National L. Ins. Co.*, 31 Misc. 403, 65 N. Y. Supp. 550, af-

firmed without opinion, 56 App. Div. 624, 67 N. Y. Supp. 1150.

1. *Metropolitan L. Ins. Co. v. Trilling*, 194 App. Div. 178, 184 N. Y. Supp. 898.

2. *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *McCoubrey v. St. Paul, etc., Ins. Co.*, 50 App. Div. 416, 64 N. Y. Supp. 112; *Fort v. Globe, etc., Ins. Co.*, 102 Misc. 584, 169 N. Y. Supp. 229.

in such a case either mistake or fraud is to be charged to the insurance carrier.³ Thus, if a policy from which a *pro-rata* clause has been expunged is cancelled and the agent is asked to procure other insurance to "replace" the policy, but by mistake of the agent the new policy provides for *pro rata* insurance instead of absolute liability, a reformation may be had.⁴

The fact that the action of reformation is not brought until after the loss has been sustained, does not necessarily bar the action; but is a circumstance to be taken into consideration in weighing the testimony and determining whether a mistake has been made.⁵

If by mutual mistake the insured premises are incorrectly described, or if the parties intended to have insurance upon certain premises but other premises are in fact described in the policy, a reformation may be had.⁶ Or, if a policy by mistake covers a building instead of the contents as intended, a reformation may be had.⁷ If, on the other hand, the insured intended to procure insurance on certain premises, but the company intended to issue a policy on other premises, which it did, the mistake is not mutual, and, in

3. *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; *Cochran Cotton Seed Oil Co. v. Phoenix Ins. Co.*, 7 Misc. 695, 28 N. Y. Supp. 45, 58 St. Rep. 381.

Name of insured.—Where a husband, on behalf of his wife, delivered to an insurance agent a policy issued to the wife, upon her property, and requested him to make out a new one in "the same form, the same name and the same amount," and the agent issued the new policy in the name of the husband, and, upon being notified of the mistake, promised to rectify it, but neglected to do so until after a loss occurs, it was held that the wife could maintain an action for the reformation of the policy and to recover the amount of the loss under the reformed policy. *McCoubrey v. St. Paul, etc., Ins. Co.*, 50 App. Div. 416, 64 N. Y. Supp. 112, affirmed without opinion, 169 N. Y. 590.

4. *Coe v. London & Lancashire F.*

Ins. Co., 184 App. Div. 604, 172 N. Y. Supp. 435.

5. *Van Tuyl v. Westchester F. Ins. Co.*, 55 N. Y. 657; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235.

6. "Plaintiff intended to procure insurance upon the household property in his residence and that is the property the defendant intended to insure, but in reducing their agreement to writing the word 'southerly' was erroneously inserted instead of the word 'northerly' as indicating the location of the residence of the assured with reference to the highway. The case, therefore, falls within the doctrine of the authorities that where there was no mistake in the agreement but merely a mistake in reducing it to writing the contract will be reformed." *LeGendre v. Scottish Union, etc., Ins. Co.*, 95 App. Div. 562, 88 N. Y. Supp. 1012.

7. *Castellano v. American Ins. Co.*, 222 App. Div. 169, 225 N. Y. Supp. 305.

the absence of fraud on the part of the company or its representatives, the policy cannot be reformed to correspond with the intent of the assured.⁸ When no fraud is shown, the policy cannot be reformed if it was written precisely as the company intended it.⁹

A fire insurance policy may be reformed where by mutual mistake of the agents of the respective parties as to the insured houses being occupied by more than two families, it contains a warranty that it should not be so occupied.¹⁰ Or, if the policy fails to mention the incumbrances upon the insured premises, it may in a proper case be reformed in this respect.¹¹ Likewise, if a policy is issued to the holder of a mortgage as owner instead of as mortgagee, the error may be corrected.¹²

4. Burglary or theft insurance.

A policy insuring property from theft may, when convincing proof of mutual mistake is presented, be reformed so that the writing will correspond with the actual agreement of the parties.¹³ Thus, if by mistake a policy is issued in the name of an officer of a corporation instead of in the corporate name, a reformation may be permitted.¹⁴ But the situation is different if the insurance carrier intended to contract with the individual officer and not with the corporation. In such a case, the court cannot make a new contract for the parties. Thus, where an individual owning all of the stock of a corporation secured burglary insurance in his own name on the property of the corporation, it was held that, inasmuch as the policy was the one which the company intended to write, it could not be reformed on account of the mistake of the stockholder.¹⁵ A policy of burglary in-

8. *Bryce v. Lorillard F. Ins. Co.*, 55 N. Y. 240; *Mead v. Westchester F. Ins. Co.*, 64 N. Y. 453.

9. *McHugh v. Imperial F. Ins. Co.*, 48 How. Pr. 230; *Wright v. American Equitable Assur. Co.*, 131 Misc. 215, 225 N. Y. Supp. 470.

10. *Schuessler v. Fire Ins. Co. of Philadelphia*, 103 App. Div. 12, 92 N. Y. Supp. 649, affirmed without opinion, 185 N. Y. 578.

11. *McGuire v. Hartford Fire Ins. Co.*, 7 App. Div. 575, 40 N. Y. Supp.

300, affirmed without opinion, 153 N. Y. 680.

12. *Houlden v. Farmer Alliance Co-Op. F. Ins. Co.*, 188 App. Div. 734, 177 N. Y. Supp. 286, affirmed, 231 N. Y. 636.

13. *Lewitt & Co., Inc. v. Jewelers' Safety F. Soc.*, 249 N. Y. 217.

14. *Schenectady Varnish Co. v. Automobile Ins. Co.*, 127 Misc. 751, 217 N. Y. Supp. 504.

15. *Geiger Watch Case Corp. v. Fidelity & Deposit Co.*, 120 Misc. 441, 199 N. Y. Supp. 555.

surance may be reformed by a court of equity;¹⁶ but, in the absence of fraud, the mistake which permits a court of equity to reform a policy of burglary insurance, must be one made by both parties.¹⁷

5. Liability insurance.

A policy of automobile liability insurance should be reformed to recite the true number of the engine and a recovery allowed against the insurer for the amount of a judgment recovered against and paid by the insured for personal injuries to a third person, where it is conceded by the insurer that the number of the engine stated in the application for insurance was erroneously stated by a mistake on the part of the insured and where it appears that the risk was not in the slightest degree affected by the number of the engine given.¹⁸

L. Wills.

While the courts have undoubted jurisdiction to construe a will so that its operation will accord with the intention of the testator, they have no power to reform the instrument. Thus, where a husband and wife intended to make wills, each in favor of the other, but by mistake each signed the will of the other, the wills are void, and a court of equity can furnish no relief.¹⁹

M. Separation agreements.

It may be that, if a husband and wife have entered into a valid separation agreement, but by mistake the intention of the parties has not been properly committed to writing, a reformation may be had. But the court will not attempt a reformation on the ground that the situation of the parties has changed since the agreement was made and that because of such change the prescribed payments to the wife are excessive or inadequate.²⁰ A court of equity can set aside a separation agreement if the provisions therein for

16. *D. R. Paskie & Co., Inc. v. Commercial Casualty Ins. Co.*, 223 App. Div. 603, 229 N. Y. Supp. 121.

17. *Silver Fox Co. v. New York Indemnity Co.*, 125 Misc. 430, 210 N. Y. Supp. 18.

18. *Tomato Products Co. v. Mfgs.*

Liab. Ins. Co., 203 App. Div. 678, 197 N. Y. Supp. 497.

19. *Nelson v. McDonald*, 61 Hun 406, 16 N. Y. Supp. 273.

20. *Stoddard v. Stoddard*, 227 N. Y. 13.

the support of the wife and children are inadequate and the wife has accepted the agreement unadvisedly or imprudently; but the courts will not make a new contract for the parties by increasing the amount of the allowance.²¹

N. Illegal verbal contracts.

If the contract sought to be reformed is void, there is nothing to reform, and the courts are without power to turn the void agreement into one which is binding. A written contract, signed by one party only and void for lack of consideration in that it is unilateral, cannot be reformed so as to embody the terms of a prior oral contract which was void under the Statute of Frauds.²² Parties cannot, by agreement, convert a judgment into a personal mortgage or a bill of sale, or to give it to any greater effect than the law gives to it. A parol agreement, therefore, that a judgment shall be a lien upon all the debtor's personal property, will not be enforced in equity, even as against subsequent assignees who assented to the arrangement.²³

ARTICLE IV.

DEFENSES.

A. Alteration of instrument.

A material alteration in the terms of a written instrument made without the consent of a party, may render it unenforceable as to such party. Thus, where a mortgage was given by a wife to secure an obligation of her husband, and a material alteration was thereafter made in the instrument without her consent, it was held that as to her it could not be reformed and enforced.²⁴

B. Statute of limitations.

1. In general.

Ordinarily it may be said that the Statute of Limitations which is applicable to an action of reformation is section 53 of the Civil Practice Act prescribing a period of ten years.²⁵ The cause of action usually accrues upon knowledge of the

21. *Matter of Warren*, 207 App. Div. 793, 202 N. Y. Supp. 586.

22. *Rosen v. Philipsborn Co.*, 135 App. Div. 499, 120 N. Y. Supp. 486.

23. *Lanning v. Carpenter*, 48 N. Y. 408.

24. *Marcy v. Dunlap*, 5 Lans., 365.

25. *Hoyt v. Putnam*, 39 Hun 402.

Recovery without reformation.—In an action seeking the reformation of a bond under seal, if the court finds that the bond is enforceable without

error or of a claim inconsistent with the instrument.²⁶ If, however, the action is based upon the fraud of the defendant, not upon the mutual mistake of the parties, subdivision 5 of section 48 of the Civil Practice Act bars the action after a lapse of six years after the discovery of the fraud.²⁷

In a particular, though somewhat common, class of cases, the statute of limitations is indefinitely extended; or, as the rule may be stated, the statute has no application. When a grantee of real estate enters into possession under a deed valid on its face, but which, by mistake does not accurately describe the premises intended to be conveyed, a reformation may be had on theory that the remedy is to remove a cloud from the title. Such a cause of action is said to be continuous so long as the occasion remains for the removal of the cloud and is unaffected by the statute of limitations.²⁸ Hence, if the grantor challenges the deed and seeks to eject the grantee, the latter may have the deed reformed, and the statute of limitations has no application to the defense.²⁹ The same rule is applied when the grantee in possession is taking the initiative to clear his title.³⁰

2. Laches.

Laches on the part of the plaintiff may justify the court, in the exercise of its discretion, in denying equitable relief

reformation, and if the complaint contains the allegations necessary for its enforcement, recovery may be had on the bond, although the ten year statute would bar an action for the reformation. *McManus v. Harrigan*, 41 Misc. 615, 65 N. Y. Supp. 220.

26. *DeForest v. Trustees of Huntington*, 153 N. Y. 229; *Perrior v. Peck*, 39 App. Div. 390, 57 N. Y. Supp. 377, affirmed without opinion, 167 N. Y. 582; *Ulman v. Equitable L. Assur. Soc.*, 161 App. Div. 708, 146 N. Y. Supp. 696, appeal dismissed, 213 N. Y. 700; *Syms v. City of New York*, 18 Jones & S. (50 Super. Ct.) 289. See also, *Bartlett v. Judd*, 21 N. Y. 200; *Mastin v. Mastin*, 1 N. Y. Supp. 746, 17 St. Rep. 625.

27. *Mitchell v. Niagara, etc., Power Co.*, 191 App. Div. 276, 181 N. Y. Supp. 899.

28. *DeForest v. Trustees of Hunt-*

ington, 153 N. Y. 229. See also, *Bartlett v. Judd*, 21 N. Y. 200.

Restrictive covenant.—Where by mutual mistake, a deed contains a covenant against the erection of buildings of a certain character on the land conveyed, within 40 feet of the front, it creates a cloud on the title, the right to remove which is a continuing one, not barred by the statute of limitations. *Jackson v. Kinsey*, 7 N. Y. Supp. 908, 28 St. Rep. 394.

29. *DeForest v. Trustees of Huntington*, 153 N. Y. 229; *Perrior v. Peck*, 39 App. Div. 390, 57 N. Y. Supp. 377, affirmed without opinion, 167 N. Y. 582.

30. *Brennan v. Thompson*, 46 Misc. 317, 94 N. Y. Supp. 684. See also, *Mastin v. Mastin*, 1 N. Y. Supp. 746, 17 St. Rep. 625.

in an action of reformation.³¹ One who knows of an error in a written instrument should act with reasonable promptness to secure the correction of the mistake; and, if by reason of the delay the other party has been prejudiced, the action may be dismissed.³² If from the lapse of time the status of the parties has changed, so that the reformation cannot be accomplished without imposing on a party a greater obligation than he assumed originally, the relief may be denied.³³ If, on the other hand, the parties have not been prejudiced during the interval from the execution of the writing, the delay in commencing the action does not furnish a ground for the denial of the relief, provided the statute of limitations is not a bar.³⁴ In cases of this character it is sometimes said that the lapse of time is only important as evidence bearing upon the probability that a mistake has really been made.³⁵ This rule seems particularly applicable when the parties have acted under an executed contract, such as a deed, without knowledge of an error in its contents. Under such circumstances the instrument may be reformed many years after its execution.³⁶ Likewise, it is recognized that an insurance policy is not usually scrutinized until after a loss has occurred, and an action to reform the policy, although not commenced until shortly after a loss, will not ordinarily be dismissed for laches.³⁷ Yet, inexcusable negligence and delay on the part of the plaintiff may tend to take from the case any equitable features, and in a close case may influence the court to deny relief.³⁸

31. *Welles v. Yates*, 44 N. Y. 525; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451; *Fuller & Co. v. Schrenk*, 58 App. Div. 222, 68 N. Y. Supp. 781, affirmed without opinion, 171 N. Y. 671.

32. *Westinghouse, etc., Co. v. Remington Salt Co.*, 116 App. Div. 123, 101 N. Y. Supp. 303, affirmed 189 N. Y. 515. Compare, *Kilmer v. Smith*, 11 Jones & S. (43 Super. Ct.) 461, affirmed, 77 N. Y. 226.

33. *Westinghouse, etc., Co. v. Remington Salt Co.*, 116 App. Div. 123, 101 N. Y. Supp. 303, affirmed, 189 N. Y. 515.

34. *Bidwell v. Astor Mut. Ins. Co.*,

16 N. Y. 263; *Welles v. Yates*, 44 N. Y. 525; *Andrews v. Gillespie*, 47 N. Y. 487; *Eidlitz v. Manhattan Wrecking & Contracting Co.*, 164 App. Div. 591, 150 N. Y. Supp. 307; *Delap v. Leonard*, 189 App. Div. 87, 178 N. Y. Supp. 102.

35. *Bidwell v. Astor Mut. Ins. Co.*, 16 N. Y. 263; *Van Tuyl v. Westchester F. Ins. Co.*, 55 N. Y. 657.

36. *Delap v. Leonard*, 189 App. Div. 87, 178 N. Y. Supp. 102.

37. *Bidwell v. Astor Mut. F. Ins. Co.*, 16 N. Y. 263; *Van Tuyl v. Westchester F. Ins. Co.*, 55 N. Y. 657; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235.

38. *Avery v. Equitable L. Assur. Soc.*, 117 N. Y. 451; *Wilson v. National L. Ins. Co.*, 31 Misc. 403, 65 N.

One is not to be charged with laches until he is cognizant of the mistake in the writing or until the opposing party has asserted claims at variance with the instrument as written.³⁹ If he commences his action shortly after the situation is thus presented to his attention, he is not guilty of laches.⁴⁰

C. Waiver.

A party by acting on an incorrectly expressed contract may ratify the contract or waive any claim for a reformation. Thus, when a party has elected to sue upon a written contract as it is, and has been defeated, he is bound by that election, and cannot thereafter bring an action to reform the contract.⁴¹ Or, if it appears that the complaining party has acted under the contract as long as it was profitable to do so, the court will hesitate to decree a reformation when the contract becomes unprofitable.⁴²

ARTICLE V.

PROCEDURE.

A. Parties.

1. Plaintiff.

Ordinarily an action for the reformation of a written instrument must be maintained by a party to the contract, or one succeeding to his rights.⁴³ But one claiming that his name was inadvertently omitted as a party to the contract may maintain an action to have the writing reformed in this respect. Thus, one claiming that an insurance policy should have been payable to him, may maintain an action to reform the policy in respect to the name of the beneficiary.⁴⁴

Y. Supp. 550, affirmed without opinion, 56 App. Div. 624, 67 N. Y. Supp. 1150.

39. *Gilroy v. Strauss Bldg. & Realty Co.*, 157 N. Y. Supp. 162, affirmed without opinion, 172 App. Div. 956, 157 N. Y. Supp. 1126.

40. *Knobloch v. Kracke*, 151 App. Div. 19, 135 N. Y. Supp. 381; *Ulman v. Equitable L. Assur. Soc.*, 161 App. Div. 708, 146 N. Y. Supp. 696, appeal dismissed, 213 N. Y. 700; *Simpkins v. Taylor*, 81 Hun 467, 31 N. Y. Supp.

169, 63 St. Rep. 491; *Gilroy v. Strauss Bldg. & Realty Co.*, 157 N. Y. Supp. 162, affirmed without opinion, 172 App. Div. 956, 157 N. Y. Supp. 1126.

41. *Steinbach v. Relief F. Ins. Co.*, 77 N. Y. 498.

42. *Fuller & Co. v. Schrenk*, 58 App. Div. 222, 68 N. Y. Supp. 781, affirmed without opinion, 171 N. Y. 671.

43. *Cady v. Potter*, 55 Barb. 463.

44. *Hamilton v. Fidelity & C. Co.*, 171 N. Y. Supp. 580.

If the contract is assignable, the cause of action for the reformation thereof may also pass by assignment so that the assignee may maintain the action against the other original party thereto.⁴⁵ A grantee of premises may maintain an action to reform earlier deeds in his chain of title.⁴⁶

2. Defendants.

All persons affected by the proposed modification in the written instrument should be party defendants.⁴⁷ In an action to reform a trust deed, all of the beneficiaries of the trust are necessary parties.⁴⁸ After the assignment of a written instrument, it cannot be reformed in an action to which the assignee is not a party.⁴⁹ If a party having an interest in the contract has filed a petition in bankruptcy, his trustee should be made a party.⁵⁰

In an action to reform a life insurance policy which it is claimed was erroneously made payable to the insured or his legal representatives, after the death of the insured, the legal representatives are necessary parties.⁵¹ Similarly, in an action to reform a policy payable to the "heirs" of the deceased so as to make it payable to his "children," all of the "heirs" should be parties.⁵²

45. *Bentley v. Smith*, 1 Abb. Dec. 126, 2 Keyes 342.

46. *Butler v. Clark*, 29 Abb. N. C. 413, 66 Hun 444, 21 N. Y. Supp. 415, 50 St. Rep. 133, affirmed, 142 N. Y. 636.

47. *Assignment for creditors*.—In an action against an assignee for the benefit of creditors, brought by a creditor for himself and all other creditors who might come in and avail themselves of the action, claiming an accounting by the assignee, and that the assignment be reformed, by substituting the proper name of an indorser with the plaintiff on a promissory note preferred in the assignment, instead of the name appearing in the assignment, which was alleged to have been mentioned or copied by mistake. *Held*, on demurrer to complaint for defect of parties, that the indorser of the note whose name was sought to be substituted by another, and the assignors, together with other creditors, standing in a lower

class than that in which such note was stated, were necessary and prior parties, on a reformation of the assignment. *Garner v. Wright*, 24 How. Pr. 144.

The creditors of a partnership are not necessary parties to an action by a third person to reform a contract made by such third person with the firm whereby he agreed to pay one-fourth of the indebtedness of the firm. *Wheat v. Rice*, 97 N. Y. 296.

48. *Conklin v. Davies*, 53 How. Pr. 409.

49. *Ryshpan v. Goldberg*, 8 Misc. 442, 28 N. Y. Supp. 657, 59 St. Rep. 578.

50. *First Nat. Bk. of Waterloo v. Bacon*, 113 App. Div. 612, 98 N. Y. Supp. 717, affirmed without opinion, 189 N. Y. 533, affirmed, 216 U. S. 134.

51. *Steinbach v. Prudential Ins. Co.*, 172 N. Y. 471.

52. *Hadley v. Travelers' Ins. Co.*, 68 Misc. 359, 125 N. Y. Supp. 83.

One, although originally a party to the contract, who no longer has an interest therein, is not generally a necessary party.⁵³ Thus, without the presence of the grantor as a party, a deed may be reformed by striking out the name of one of the grantees.⁵⁴ Likewise, in an action by a grantee from a purchaser at an execution sale to reform the description in the sheriff's deed, the action may be maintained against the judgment debtor and those claiming under him, and it is not necessary to join as defendants the sheriff who executed the deed or the plaintiff's grantor.⁵⁵ A mortgagee may not be a necessary party to reform a mortgage where the instrument has been assigned to another.⁵⁶

3. Purchasers in good faith.

Reason seems to require a holding that a purchaser in good faith and for value of the contract or the property affected thereby will be protected;⁵⁷ but there is authority to the effect that such a purchaser takes subject to the equities of the original parties.⁵⁸ In any event an action may be maintained to reform a deed in the chain of title if the present owner of the fee at the time of accepting title had actual knowledge of the situation.⁵⁹ Or, if an assignee of

53. Proper party.—After the assignment of a lease, the assignor may be a proper party in an action for its reformation. *Hackett v. View*, 109 App. Div. 351, 95 N. Y. Supp. 675.

54. *Butler v. Butler*, 93 Misc. 258, 157 N. Y. Supp. 188.

55. *Butler v. Clark*, 29 Abb. N. C. 413, 66 Hun 444, 21 N. Y. Supp. 415, 50 St. Rep. 133, affirmed without opinion, 142 N. Y. 636.

56. *Andrews v. Gillespie*, 47 N. Y. 487.

57. See, *Casler v. Sitts*, 6 Hun 659.

58. *Jamaica Sav. Bank v. Taylor*, 72 App. Div. 567, 76 N. Y. Supp. 790.

59. *Bush v. Hicks*, 60 N. Y. 298; *Crippen v. Baumes*, 15 Hun 136.

Street.—Where a conveyance to a village of a street already opened describes, because of a mutual mistake, a piece of land other than that embraced in the street as actually opened,

the deed will be reformed, on discovery of the mistake, after the lapse of six years, as against a party who, in the interval, has purchased of the grantor of the street land embraced within the street as actually opened, when the street, as opened, was clearly visible, and such purchaser was shown, at the time of his purchase, a diagram upon which it was laid out, and he at first began the construction of a building with reference to the street as actually located, although he changed the plan of the building when he learned what the description in the deed to the village was, and when notified that he was wrong and must not build there, responded: "I know it, but they tell me I can claim it there." *Penfield v. Village of New Rochelle*, 18 App. Div. 83, 45 N. Y. Supp. 460, affirmed on opinion below, 160 N. Y. 697.

the contract or a purchaser of the premises did not part with value, reformation may be had as against him.⁶⁰

A mortgagee who seeks to avail himself of an assumption clause in a subsequent deed of the mortgaged premises is said to take under and through the grantor and to be subject to defenses arising out of the contract or transaction between the original parties to the deed.⁶¹ In the absence of any grounds for an estoppel, the assumption clause may be stricken out as against a purchaser of the mortgage,⁶² for it is the general rule that the assignee of the mortgage takes it subject to the equities between the original parties.⁶³ But, in an action of foreclosure by an assignee of the mortgage, a purchaser of the premises will not be relieved from personal liability on such a covenant, where the assignee has acted upon the covenant to an extent that reformation would work an injury to him, so that, irrespective of the security, the elimination of the covenant would be inequitable.⁶⁴

B. Complaint.

1. In general.

The complaint in an action of reformation should allege the agreement which the parties intended; the agreement actually committed to writing; and the facts relating to the mutual mistake or the fraud forming the basis for the action.⁶⁵ The complaint must contain either an allegation

60. *DePeyster v. Hasbrouck*, 11 N. Y. 582.

A trustee in bankruptcy is not a bona fide purchaser for value. *First National Bank of Waterloo v. Bacon*, 113 App. Div. 612, 98 N. Y. Supp. 717, affirmed without opinion, 189 N. Y. 533, affirmed, 216 U. S. 134.

61. *Arnstein v. Bernstein*, 127 App. Div. 500, 111 N. Y. Supp. 987.

62. *Real Estate T. Co. v. Balch*, 13 Jones & S. (45 Super. Ct.) 528.

63. *Andrews v. Gilespeie*, 47 N. Y. 487; *Renz v. Ernst*, 160 N. Y. Supp. 577.

64. *Renz v. Ernst*, 160 N. Y. Supp. 577.

65. *Syenite Trap Rock Co. v. Williams*, 167 App. Div. 774, 153 N. Y.

Supp. 74; *Leary v. Geller*, 169 App. Div. 232, 154 N. Y. Supp. 507; *Wemple v. Stewart*, 22 Barb. 154; *Coles v. Bowne*, 10 Paige 526.

Insufficient allegation.—A complaint is insufficient if it alleges merely that, if a clause is capable of the construction claimed by the defendant, it was inserted by mistake of the parties, and at least by the mistake of the plaintiff. *Syenite Trap Rock Co. v. Williams*, 167 App. Div. 774, 153 N. Y. Supp. 74.

Insurance policy.—A complaint in an action to recover damages on an insurance policy, which prays that, if the same is necessary, the policy be reformed in such a manner as fully and clearly to express the intention and agreement of the parties, does not

of mutual mistake, or a statement of facts showing a mistake of one party and the fraud of the other.⁶⁶ But the complaint may be drawn so as to state in the alternative these two grounds for relief.⁶⁷ The plaintiff may allege in the alternative and secure relief according to his proof, and the defendant cannot compel him to make the complaint more definite as to the ground on which he relies.⁶⁸

It is not necessary that mutual mistake or fraud be expressly charged, for the complaint is sufficient if it alleges the essential facts without characterizing them.⁶⁹ It is sufficient in this respect if the facts alleged or the inferences to be drawn therefrom by fair intendment show either fraud or mistake on the part of the defendant.⁷⁰

2. Joinder of causes.

A complaint which states the grounds for relief in the alternative as for mutual mistake or for the mistake of one party and the fraud of the other, states but one cause of action.⁷¹ It is proper in an action for reformation to seek recovery on the instrument as reformed or for damages for its breach, and a complaint asking for such damages states but one cause of action.⁷²

3. Amendment.

A complaint which alleges as a ground for relief either the mutual mistake of the parties or the mistake of one party

sufficiently ask reformation, and the plaintiff should be required to strike out such prayer or to ask directly that the policy be reformed and state what the reformation will be. *Lamoreux v. Atlantic Mutual Ins. Co.*, 3 Duer (10 Super. Ct.) 680.

66. *Story v. Congor*, 36 N. Y. 673.

67. *Kass v. Garment Center Realty Co.*, 209 App. Div. 647, 205 N. Y. Supp. 94; *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 78 Hun 462, 29 N. Y. Supp. 233, 60 St. Rep. 774, affirmed, 149 N. Y. 51. See also, *Russell v. Brownell*, 20 Week. Dig. 504.

68. *Kass v. Garment Center Realty Co.*, 209 App. Div. 647, 205 N. Y. Supp. 94.

69. *Maier v. Hibernia Ins. Co.*, 67 N. Y. 283; *Arlt v. Whitlock*, 65 App. Div. 246, 72 N. Y. Supp. 522; *Friedman Marble & Slate Works v. Whitcomb*, 186 App. Div. 509, 174 N. Y. Supp. 531.

70. *Arlt v. Whitlock*, 65 App. Div. 246, 72 N. Y. Supp. 522; *Friedman Marble & Slate Works v. Whitcomb*, 186 App. Div. 509, 174 N. Y. Supp. 531.

71. *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 78 Hun 462, 29 N. Y. Supp. 233, 60 St. Rep. 774, affirmed, 149 N. Y. 51. And see, the preceding paragraph.

72. *Maier v. Hibernia Ins. Co.*, 67 N. Y. 283; *Manheimer v. Kuhn*, 173 App. Div. 135, 159 N. Y. Supp. 437; *Gooding v. McAlister*, 9 How. Pr. 123;

and the fraud of the other party, may be amended on the trial so as to include both grounds in the alternative.⁷³ But such an amendment is a matter of discretion, and its refusal will not be reversed by an appellate court.⁷⁴ It has been thought, however, that an amendment is not necessary where the complaint alleges the execution of the instrument under a mistake of the plaintiff and the fraud of the defendant, and that the plaintiff can recover on the ground of mutual mistake, as such a variance is immaterial unless it has actually misled the defendant.⁷⁵

4. Form of complaint for reformation of deed.⁷⁶

(Title.)

The plaintiff, appearing herein by his attorney, Stanley Holcomb Molleson and complaining of the defendants above named respectfully shows to this court and alleges:

First. On information and belief that on May 16th, 1906, and at all the times hereinafter mentioned previous thereto the defendant, John B. Ireland, was the owner in fee of the following described premises:

(Here insert description.)

Second. That in or about the month of April, 1906, the said defendant, John B. Ireland, entered into an agreement with the plaintiff whereby for a valuable consideration which plaintiff agreed to pay to said defendant, John B. Ireland, the said John B. Ireland agreed to sell and convey to the plaintiff by full covenant and warranty deed the premises above described.

Third. That thereafter and on or about May 16th, 1906, in pursuance of said agreement the said defendant, John B. Ireland, executed and delivered to the plaintiff a full covenant and warranty deed executed by himself and his wife, the defendant, Adelia Duane Ireland.

Fourth. That the said deed is dated May 16th, 1906, and was recorded in the office of the Clerk of Ulster County on the 18th day of May, 1906, at 9 o'clock A. M., in Liber 394 of Deeds at page 566.

Fifth. That the said premises described in paragraph "First" of this complaint were at the commencement of this action, and

Monne v. Ayer, 20 Jones & S. (52 Co., 42 App. Div. 201, 59 N. Y. Supp. Super. Ct.) 139. And see, *infra*, V-H, 7.

Relief Granted.
73. Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co., 78 Hun 462, 29 N. Y. Supp. 233, 60 St. Rep. 774, affirmed, 149 N. Y. 51.

74. Carey Mfg. Co. v. Merchants Ins.

75. Paisley v. Casey, 18 N. Y. Supp. 102, 41 St. Rep. 339.

76. This form is adapted from that used in Beatty v. Ireland, 152 App. Div. 588.

have been for the year preceding and from said May 16th, 1906, in plaintiff's possession.

Sixth. That plaintiff is the sole owner in fee of said premises.

Seventh. That plaintiff holds said premises as purchaser and that he acquired his aforesaid estate therein as herein set forth.

Eighth. That the premises described in said deed executed by the defendants, John B. Ireland and Adelia Duane Ireland, and delivered to the plaintiff embrace merely the first parcel of land described in paragraph "First" of this complaint and do not embrace the second parcel of land described in said paragraph "First" of this complaint, and referred to therein as containing thirteen acres, two roods and fifteen perches of land.

Ninth. That the description set forth in said deed of the premises intended to be conveyed thereby was erroneous, that that portion of the said premises consisting of the second parcel of property described in paragraph "First" of this complaint, and referred to therein as containing thirteen acres, two roods and fifteen perches of land was intended by the parties to said deed to be also included therein, that the omission of the same from said deed was due to mutual mistake of the parties to said deed and that to make said deed conform to the actual intention of the parties it is necessary that the description contained in said deed should be amended by embracing therein a description of the second parcel of property described in paragraph "First" of this complaint and referred to therein as containing thirteen acres, two roods and fifteen perches of land.

Tenth. That the plaintiff has paid to the defendant, John B. Ireland, for the said premises described in paragraph "First" of this complaint and intended to be conveyed as aforesaid, the consideration agreed upon for said transfer and referred to in said deed.

Eleventh. On information and belief that heretofore and on or about January 28th, 1909, in an action brought in the New York Supreme Court, County of Dutchess, wherein the defendant Edward E. Perkins herein, was plaintiff and the defendant, John B. Ireland herein and one John de Courcy Ireland were defendants, said Edward E. Perkins recovered judgment against said John B. Ireland and John de Courcy Ireland for the sum of \$315.68 damages and costs; that said judgment was thereupon entered in the office of the Clerk of the County of Dutchess, that thereafter a transcript of said judgment was filed and said judgment docketed in the office of the Clerk of the County of Ulster; that thereafter and on or about July 11th, 1910, an execution upon said judgment against the property of the defendant, John B. Ireland, was issued out of this court to the Sheriff of the County of Ulster.

Twelfth. That by virtue of said execution said sheriff claims to have seized all the right and title which the defendant, John B. Ireland, had on the 6th day of June, 1910, in and to the real property consisting of the second parcel of land described in paragraph "First" of this complaint and referred to therein as containing thirteen acres 2 roods and fifteen perches of land and is threaten-

ing and is about to sell the same at the County Court House, in the City of Kingston, Ulster County, on the 22nd day of September, 1910, at 12 o'clock noon and is publishing a notice of sale thereof to that effect.

Thirteenth. That the said defendant, Edward E. Perkins, unjustly claims an interest or estate in said real property consisting of the second parcel of land described in paragraph "First" of this complaint and referred to therein as containing thirteen acres 2 roods and fifteen perches of land adverse to that of plaintiff, to wit, that he holds a lien or incumbrance thereon by virtue of said judgment of the amount of more than \$250.00.

Fourteenth. That the defendant, Oliver H. Payne, unjustly claims an interest or estate in said premises adverse to that of plaintiff, to wit, the adverse claim that he is seized of said premises in fee.

Fifteenth. That said premises are of the value of over Two thousand (\$2,000.00) Dollars.

Wherefore, plaintiff demands judgment that the defendants and each of them and all claiming under them and each of them be forever barred from all claim to an estate in the premises herein described and from all claim to an interest or easement therein or lien or encumbrance thereon, that said deed executed by the defendants, John B. Ireland and Adelia Duane Ireland, his wife, be reformed and corrected as aforesaid; that all proceedings to collect the amount due to the defendant, Edward E. Perkins, on the aforesaid judgment be forever stayed in respect to the premises herein described and that plaintiff have such other and further relief as may be just, together with the costs of this action.

5. Form of complaint for reformation of deed on the ground of deficiency of acreage.⁷⁷

(Title.)

The plaintiff complains:

I. That the plaintiff is a resident of the County of Kings in the State of New York.

II. That on or about the 16th day of February, 1906, the defendants, Frank Thilberg, Irving B. Squire, Otto Kampfe and one Richard Kampfe, sometimes known as Paul Richard Kampfe, deceased, entered into a written agreement with one Clayton A. Penhale, for the sale and purchase of a certain piece of ground owned by the defendants and said Richard Kampfe, deceased, and situated in the Town of Oyster Bay, Queens (now Nassau) County, at Manetto Hill, and represented by defendants to said Penhale and believed by him to contain 264.65 acres, a copy of which agreement is hereto annexed, and marked Exhibit A, and made a part hereof.

III. That at the time negotiations were commenced between the said defendants Otto Kampfe, Irving B. Squire, Frank Thilberg and Richard Kampfe, deceased, and Clayton A. Penhale, the said

⁷⁷ This form is adapted from that used in *Mills v. Kampfe*, 202 N. Y. 46.

Penhale asked the said parties how much land was included in the said piece of ground or farm and was informed that it contained 264.65 acres and that the asking price therefor was \$200 per acre.

IV. That thereafter the said Penhale offered the sum of \$185 per acre, and the parties to the said contract finally agreed upon the sum of \$49,000 as the price for the entire piece of land or farm which was at the rate of \$185.52 per acre.

V. That thereafter, and on or about the 20th day of February, 1906, and before the terms and conditions of the said contract had been carried out, the said Clayton A. Penhale assigned the said contract in writing to plaintiff herein, at which time, and as an inducement thereto, and thereafter, the parties to the said contract represented to plaintiff that the said piece of ground contained 264.65 acres.

VI. That thereafter, and on or about the 21st day of April, 1906, the said Richard Kampfe, sometimes known as Paul Richard Kampfe, deceased, being then a resident of Kings County, in the State of New York, died, leaving a Last Will and Testament, in which he appointed the defendant, Catharina Kampfe, Executrix, and which was duly presented to the Surrogate's Court, in Kings County, and admitted to probate on or about the 14th day of May, 1906, and said defendant, Catharina Kampfe, thereupon duly qualified as Executrix of the Last Will and Testament of said Richard Kampfe, sometimes known as Paul Richard Kampfe, deceased, and letters testamentary were thereupon issued to said defendant, Catharina Kampfe, which are now in force, and said defendant, Catharina Kampfe, is now acting as Executrix of the Last Will and Testament of said Richard Kampfe, sometimes known as Paul Richard Kampfe, deceased.

VII. That thereafter and by an order of the Surrogate of Kings County, duly made and entered on the 10th day of May, 1906, the defendant, Catharina Kampfe, was appointed Executrix under the Last Will and Testament of the said Richard Kampfe, sometimes known as Paul Richard Kampfe, deceased, with full powers as such Executrix.

VIII. That thereafter the defendant, Catharina Kampfe, acted as such Executrix, in conjunction with the other defendants named herein as to the matters and representations set forth herein.

IX. That the plaintiff relying on said representations set forth in Paragraphs I and II, and the common understanding of defendants and said Richard Kampfe, deceased, and herself as to the quantity of land in said piece of ground or farm as a basis for said negotiations and agreement, and that without such understanding she would never have entered into said agreement, entered into the said agreement and agreed to pay for the said piece of ground the sum of \$49,000, which sum was agreed upon between the parties hereto as the fair and reasonable value of 264.65 acres at the rate of \$185.52 per acre.

X. That apart from the aforesaid statements of the defendants and Richard Kampfe, deceased, and certain printed descriptions of said farm shown to plaintiff by said defendants and Richard

Kampfe, deceased, which were precisely as hereinbefore set forth and as contained in said contract and deeds, she had no information in regard to said quantity except as one could judge from the eye by merely looking over said land or farm.

XI. That thereafter, the plaintiff, relying on the representations set forth herein, fully complied with all the conditions by her to be performed, and on or about the 17th day of July, 1906, paid the full purchase price as follows: \$2,000 in cash and by a \$27,000 purchase money bond and mortgage, and received two certain deeds to the said piece of ground, which deeds recited the said premises to contain 264.65 acres, and which deeds were duly recorded in the office of the Clerk of Nassau County, in Liber 110, at pages 238 and 239 of Deeds, September 17, 1907.

XII. That the said premises did not contain 264.65 acres, but in fact only 230.192 acres.

XIII. That plaintiff is informed and believes that the aforesaid statements and representations were made by said defendants and said Richard Kampfe, deceased, in entire good faith, and in the belief on their part, as well as on the part of the plaintiff, that there was in fact in said parcel or farm of land the whole quantity of land mentioned in said contract and deeds.

XIV. That plaintiff did not ascertain the facts set forth herein in paragraph marked XII until she has signed a contract to sell the said premises as containing 264.65 acres, and that thereafter she was compelled to convey the said premises or farm under the terms of her said contract and to accept therefor payment for 230.192 acres instead of for 264.65 acres.

XV. That thereafter, and as soon as plaintiff had ascertained that the said representation as to acreage was untrue, she demanded of defendants a return of \$6,392.65, being the difference between the said 264.65 acres and 230.192 acres, which defendants refused and still refuse.

Wherefore, the plaintiff prays judgment:

1. That the said contract mentioned herein be reformed on account of the aforesaid mutual mistake and deficiency in regard to the quantity of said land, to include only 230.192 acres at a price of \$42,607.35.

2. For the payment to plaintiff by defendants of \$6,392.65, with interest from the 17th day of July, 1906, by reason of the facts set forth herein, and for such other and further relief as may be equitable, together with the costs of this action.

(Annex Exhibit A.)

6. Form of complaint for reformation of fire insurance policy.⁷⁸

(Title.)

The plaintiff complains and alleges:

1. That he was the owner of a double frame building, situate on the north side of Central Avenue, in the City of Albany, occu-

⁷⁸ This form is adapted from that used in *Maher v. Hibernia Fire Ins. Co.*, 67 N. Y. 283.

pied by Rathbone & Lefevre, as a hide house; of a frame shed and fences in rear of the above building; of a double frame building, situate on the north side of Central Avenue aforesaid, and known as numbers 440 and 442; of shed, fences and stables situated in rear of the above; of slaughter house, situated in rear of the above; of slaughter house, situated on Clinton Avenue in said City of Albany, in the County of Albany; and frame stable, situate on the south side of said Clinton Avenue adjoining Moore property, at the time of the destruction of said property by fire as hereinafter mentioned.

2. That on the 29th day of July, 1871, at the City of Albany, in the said County of Albany, in consideration of sixty dollars to the defendant paid by the plaintiff, the defendant executed to the plaintiff, a policy of insurance on the said property, in the words and figures following: that is to say,

(Copy of policy to be inserted.)

3. And the plaintiff further shows, that on the 19th day of May, 1872, the said property was totally destroyed by fire, except the slaughter house, and the frame stable adjoining, Moore property.

4. That the plaintiff's loss thereby was \$4,600.

5. That on or about the 27th day of May, 1872, the plaintiff furnished the defendant with proof of his loss and interest and otherwise duly performed all the conditions of the said policy on his part.

6. That the defendant has not paid said loss, although thereto often requested.

7. And the plaintiff further shows, that at the time of, and before the issuing of the said policy of insurance, the principal story of the double frame building mentioned therein, was occupied by Mrs. Elizabeth Collette, the front room of which was used by her as a grocery, wherein was sold such articles as bread, soap, &c., besides ales and liquors in small quantities; that the defendant's agent, residing in the city made a preliminary survey and examination of said double frame building as well as of the other of said plaintiff's property insured by the defendant. And particularly of the grocery part of said double frame building occupied and used as aforesaid by the said Elizabeth Collette before making said contract of insurance and the delivery of said policy; that plaintiff called the attention of the said agent thereto, before and at the time of the making and issuing of said policy, inquiring whether the fact, that the said Elizabeth Collette kept said grocery, and sold ales and liquors therein, should not be expressed and stated in said policy, to which said agent replied: no, it is not necessary to mention it. So small a matter as that is never mentioned in the policy. And so the same was not expressed in said policy. And the plaintiff avers that the omission to make mention of such fact, was the act of said defendant, and not of said plaintiff; and the plaintiff hereby sets up and insists upon such act of the defendant as a valid excuse for the language of the said policy with respect to said double frame building and for a reform thereof conformable to the agreement of insur-

ance as above stated if necessary for the proper adjudication of the plaintiff's rights in the premises.

Wherefore the plaintiff demands judgment against the defendant for four thousand six hundred dollars, with interest thereon from the 27th day of May, 1872, besides costs; and for such other and further judgment as may be proper.

7. Another form of complaint to reform fire insurance policy.⁷⁹

(Title.)

The complaint of the plaintiff shows to this court:

First. That heretofore, and on or about the 28th day of June, 1867, the plaintiff was the owner and holder of a mortgage, made by Nathan Smith and Jane, his wife, of Mount Vernon, Westchester County, to secure the payment to plaintiff of the sum of two thousand five hundred dollars and interest, said principal sum being the amount theretofore loaned and advanced by her to said mortgagors; and which said mortgage covered premises in the Village of Mount Vernon aforesaid, in said mortgage particularly mentioned and described.

Second. That, as plaintiff is informed and believes, at the time of the making and execution of said mortgage and the policies of insurance hereinafter mentioned, there was upon the mortgaged premises a two-story and attic frame building; and that at or about the date hereinbefore mentioned, the defendants herein, in consideration of the sum of twenty-five dollars premium paid therefor, made, executed and delivered to plaintiff their certain policy of insurance on said building, of which a copy is hereunto annexed marked "A," and which plaintiff prays may be taken as a part of this her complaint.

Third. That said insurance was effected through Allan Hay, the husband of plaintiff, at the instance of the mortgagors above named, and that, as plaintiff is informed and believes, said mortgagors paid the above mentioned premium thereon upon the understanding and condition that such insurance should enure to their benefit.

Fourth. That, as plaintiff is informed and believes, it was thereupon agreed on the part of the defendants in consideration of the premium of thirty dollars to be paid therefor, making an additional premium of five dollars, that they would renew the insurance upon the premises aforesaid for the period of one year, viz.: from the first day of June, 1868, to the first day of June, 1869, and that the risk to be covered by said renewal policy should be increased to the sum of three thousand dollars, being the aggregate amount of the mortgage indebtedness aforesaid; and said defendants did renew said insurance to such increased amount for the period aforesaid, and agreed that they would make out and deliver to plaintiff a policy of insurance in accordance with said agreement.

⁷⁹. This form is adapted from that used in *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235.

Sixth. That said last named insurance was effected through Alan Hay, the husband of plaintiff, at the instance of the mortgagors above named, and, as plaintiff is informed and believes, said mortgagors paid the above mentioned premium thereon upon the understanding and condition that such insurance should enure to their benefit.

Seventh. That said renewal policy was not made out by defendants at the time the agreement therefor was made, but subsequently thereto; and on or about the ——— day of July, 1868, the defendants made and delivered to plaintiff a policy, of which a copy is hereunto annexed marked "B," and which plaintiff prays may be taken as a part of this her complaint.

Eighth. That said policy differs essentially from the agreement made by defendants as aforesaid, and from the former policy issued by them, and especially in this particular, that the same contains the following clause, viz.:

"In all cases of loss the assured shall assign to this company all his right to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of this company. When insured as a mortgagee, the loss shall not be payable until payment of the debt shall have been enforced as can be collected out of the original security, to which this policy may be held as collateral, and this company shall then only be liable to pay such sum, not exceeding the amount insured, as cannot be collected out of such primary security."

And which said clause and condition did not enter into or form any part of such original policy, nor the agreement for the renewal thereof.

Ninth. That said renewal policy was changed and modified in the particular aforesaid without the authority of plaintiff, and without her knowledge and consent.

Tenth. That plaintiff did not examine said policy when the same was so delivered, and had no knowledge that the same contained the clause and condition hereinbefore mentioned, and was not made out in conformity with the agreement aforesaid, until subsequent to the loss by fire hereinafter mentioned.

Eleventh. That said policy of insurance was renewed by the defendants from time to time, and such renewals were effected by the ordinary renewal receipts and not by the issuing of new policies, and on the first day of June last said insurance was renewed by defendants in like manner for the further period of one year; and, as plaintiff is informed and believes, each and every of the premiums upon the occasions of such successive annual renewals were paid by the mortgagors above mentioned, and upon the understanding and condition that such insurance should enure for their benefit.

Twelfth. That on or about the 9th day of October, 1873, the building on the mortgaged premises mentioned and referred to in the policy aforesaid was wholly destroyed by fire, and such fire happened without any fault of plaintiff, and, as she believes, without any fault of said mortgagors, and that the value of the said

building at the time of such destruction was not less than the sum of six thousand dollars.

Thirteenth. That due notice of said loss was given to the defendants, and that plaintiff has also delivered to the defendants an account and proofs of said loss, as required by the terms and conditions of said policy, and that more than sixty days have elapsed since such account and proofs were so delivered.

Fourteenth. That plaintiff has caused application to be made to defendants to reform or consent to a reformation of the policy last issued as herein aforesaid, by cancelling and erasing therefrom the clause hereinbefore mentioned, and to make the same to conform to the agreement so made as herein aforesaid, but that said defendants have declined and refused so to do.

Fifteenth. That plaintiff is still the owner and holder of the mortgages hereinbefore mentioned, and that the same are wholly due and unpaid.

Wherefore the plaintiff demands judgment that the policy so made and issued by defendants, of which Exhibit "B" is a copy, may be reformed so as to conform to the agreement hereinbefore mentioned and alleged, by striking therefrom the clause specifically set forth in the eighth clause of this complaint, and that defendants may be adjudged to pay to the plaintiff the sum of three thousand dollars, with interest, the amount of the loss sustained by her under said policy, and that plaintiff may have such other or further relief as she may be entitled to, and may recover her costs of this action.

(Annex exhibits.)

C. Counterclaim.

Where a grantor sues to reform a deed upon the ground that by mutual mistake the description included a larger amount of land than the parties intended to convey, a counterclaim which in substance alleges that the plaintiff grantor represented to the grantee that the lot was of the width described, and that in ignorance of the real fact and relying upon the grantor's representation the grantee agreed to purchase the property for a certain sum, which exceeded the value of the land because it was of less width than represented, whereby the grantee was damaged in a certain sum, tends to diminish or defeat the plaintiff's recovery and states a good cause of action.⁸⁰

D. Reformation as defense or counterclaim to another action.

In an action to enforce a written contract or to secure a right or advantage under an instrument, the defendant may

⁸⁰ *Stolitsky v. Linscheid*, 150 App. Div. 253, 134 N. Y. Supp. 805.

ask for the reformation of the writing so as to express correctly the intention of the parties thereto.⁸¹ This is frequently accomplished in an action of ejectment, where a defendant in possession is allowed to perfect his title by a reformation of the deeds of conveyance.⁸² The answer may seek the reformation as an equitable counterclaim,⁸³ in which case a reply should be interposed by the plaintiff.⁸⁴ But the facts justifying the reformation may be pleaded merely as an equitable defense.⁸⁵ If appropriate facts are alleged in the answer, the reformation may be had although the defendant has not expressly asked for such relief.⁸⁶ But, the reformation may not be urged as a counterclaim unless all of the parties necessary for such relief are joined either as plaintiffs or defendants. In case a necessary party is not joined, the remedy of the defendant is an independent action, the court in the meantime staying the former action until the determination of the latter.⁸⁷

E. Trial of issues.

An action of reformation, being of equitable nature, is triable without a jury.⁸⁸ The fact that the plaintiff seeks additional relief in money damages, as, for example, a

81. *Haire v. Baker*, 5 N. Y. 357; *Bartlett v. Judd*, 21 N. Y. 200; *Susquehanna Steamship Co. v. A. O. Andrews & Co.*, 239 N. Y. 285; *Madison v. Benedict*, 73 App. Div. 112, 76 N. Y. Supp. 402; *National Gum, etc., Co. v. MacCormack*, 124 App. Div. 569, 109 N. Y. Supp. 286; *Isaacs v. Schmuck*, 218 App. Div. 516, 194 N. Y. Supp. 155; *Colville v. Chubb*, 26 Abb. N. C. 372, 14 N. Y. Supp. 433; *Auburn City Bank v. Leonard*, 20 How. Pr. 193; *Gillespie v. Moon*, 2 Johns. Ch. 585.

Assumption of mortgage.—A deed whereby the grantee of premises assumed the payment of an incumbrance thereon, may be reformed in an action for the foreclosure of the mortgage. *Arnstein v. Bernstein*, 127 App. Div. 550, 111 N. Y. Supp. 987.

82. *Bartlett v. Judd*, 21 N. Y. 200; *DeForest v. Trustees of Huntington*, 153 N. Y. 229; *Perrior v. Peck*, 39 App.

Div. 390, 57 N. Y. Supp. 377, affirmed without opinion, 167 N. Y. 582; *Cramer v. Benton*, 4 Lans. 291.

83. *Thomas v. Bronx Realty Co.*, 60 App. Div. 365, 70 N. Y. Supp. 206; *National Gum, etc., Co. v. MacCormack*, 124 App. Div. 569, 109 N. Y. Supp. 286.

84. *Wemple v. Stewart*, 22 Barb. 154.

85. *Haire v. Baker*, 5 N. Y. 357; *Susquehanna Steamship Co. v. A. O. Andrews & Co.*, 239 N. Y. 285; *Auburn City Bank v. Leonard*, 20 How. Pr. 193. Compare, *Born v. Schrenkeisen*, 110 N. Y. 55.

86. *Schultz v. Busendorf*, 117 Misc. 405, 191 N. Y. Supp. 629.

87. *Johnson v. Johnson*, 157 App. Div. 289, 142 N. Y. Supp. 416.

88. *Imperial Shale Brick Co. v. Jewett*, 169 N. Y. 143; *Garth Estates v. Bronx Parkway Commission*, 177

recovery on the contract as reformed, does not require that the issues be sent to a jury.⁸⁹ Specific issues of fact may, however, be sent to a jury under sections 429 and 430 of the Civil Practice Act.⁹⁰

If, in an action at law, a counterclaim is interposed by the defendant asking for the reformation of a written instrument which affects the merits of the plaintiff's cause of action, the defendant is, in some cases, entitled under section 424 of the Civil Practice Act to a separate trial of the issues created by the counterclaim and the reply.⁹¹ To secure such a separate trial at Special Term, the defendant should apply for an order to that effect before the case comes on for trial at a Trial Term.⁹² In the absence of an order for the trial of the issues at Special Term, all of the issues may be determined at the Trial Term.⁹³

If the right to reformation is urged as a defense, not as a counterclaim, to an action at law, all of the issues are triable by the jury.⁹⁴ If the equities of the defendant are urged both as a defense and a counterclaim, and the facts are sufficient as a defense to protect his rights, he is not entitled to a separate trial of the issues created on the counterclaim.⁹⁵ The defendant is not entitled to a separate trial of the equitable issues because he designates his defense as a counterclaim, when all his rights can be protected by treating it as a defense.⁹⁶ Section 424 of the Civil Practice Act was intended to provide for the mode of trial of an issue arising upon a counterclaim in which the facts alleged do not constitute a defense and are not available as such.⁹⁷

App. Div. 6, 163 N. Y. Supp. 950; Hessler v. North River Ins. Co., 211 App. Div. 595, 207 N. Y. Supp. 529.

89. Imperial Shale Brick Co. v. Jewett, 169 N. Y. 143; Hessler v. North River Ins. Co., 211 App. Div. 595, 207 N. Y. Supp. 529.

90. Jackson v. Andrews, 59 N. Y. 244.

91. Thomas v. Bronx Realty Co., 60 App. Div. 365, 70 N. Y. Supp. 206; Syenite Trap Rock Co. v. Williams, 167 App. Div. 774, 153 N. Y. Supp. 74; Colville v. Chubb, 26 Abb. N. C. 372, 14 N. Y. Supp. 433.

92. City of New York v. Matthews, 156 App. Div. 490, 141 N. Y. Supp. 432, affirmed, 213 N. Y. 563.

93. City of New York v. Matthews, 213 N. Y. 563.

94. Susquehanna Steamship Co. v. A. O. Anderson & Co., 239 N. Y. 285.

95. Bennett v. Edison Electric Illuminating Co., 164 N. Y. 131.

96. Bennett v. Edison Electric Illuminating Co., 164 N. Y. 131.

97. Bennett v. Edison Electric Illuminating Co., 164 N. Y. 131.

F. Temporary injunction.

When necessary for the preservation of the rights of the parties, the court may grant a temporary injunction restraining the enforcement of the contract until the determination of an action for its reformation.⁹⁸

G. Abatement and revival.

Upon the death of the plaintiff, the action may be revived in the name of the person succeeding to his interest in the writing under litigation. Hence, in an action by an insured to reform a policy of life insurance, after the death of the plaintiff, an assignee of the beneficiary may be substituted as plaintiff.⁹⁹

An action by a grantee to reform a deed does not abate upon the conveyance by him of his interest in the property, but he may continue the action under the provisions of section 83 of the Civil Practice Act.¹

H. Relief granted.**1. In general.**

A court of equity having entertained an action of reformation may determine the entire controversy between the parties. A court of equity always seeks to do complete justice and to make its judgments so full and comprehensive as to quiet the controversy in all its aspects and as to all persons.² Upon decreeing a reformation, it may proceed to determine the damages to which the plaintiff is entitled by reason of a breach of the contract as reformed.³ Or, after a reformation, it may be enforced by specific performance.⁴

98. *Humphreys v. Hurtt*, 5 T. & C. 433.

99. *Hunt v. Provident Sav. L. Assur. Soc.*, 77 App. Div. 338, 79 N. Y. Supp. 74.

1. *Phillips v. West Rockaway Land Co.*, 203 App. Div. 202, 196 N. Y. Supp. 723.

2. *Steinbach v. Prudential Ins. Co.*, 172 N. Y. 471.

3. *Bidwell v. Astor Mutual Ins. Co.*, 16 N. Y. 263; *Welles v. Yates*, 44 N. Y. 525; *Maher v. Hibernia Ins. Co.*, 67 N. Y. 283; *Imperial Shale Brick*

Co. v. Jewett, 169 N. Y. 143; *Hunt v. Provident Sav. L. Assur. Soc.*, 77 App. Div. 338, 79 N. Y. Supp. 74; *Manheimer v. Kuhn*, 173 App. Div. 135, 159 N. Y. Supp. 437; *Gooding v. McAlister*, 9 How. Pr. 123; *Monne v. Ayer*, 20 Jones & S. (52 Super. Ct.) 139.

4. *Webb v. Morrison*, 37 N. Y. Supp. 449, 72 St. Rep. 720, affirmed without opinion, 157 N. Y. 712; *Shultz v. Busendorf*, 117 Misc. 405, 191 N. Y. Supp. 629.

Where the acreage of premises is incorrectly stated in a deed, the deed may be reformed, in some cases, so as to allow the purchaser an abatement of the purchase to correspond with the deficiency of the acreage.⁵

2. Relief in lieu of reformation.

If the plaintiff fails to produce sufficient evidence to justify a reformation of the contract, the court will not attempt to determine the construction to be given to the instrument.⁶ When the substantial purpose of an action is to reform an instrument, and that purpose fails, the plaintiff is not entitled to a judicial construction of the instrument holding that as originally drawn its meaning is the same as it would have been had it been reformed.⁷ And, where the sole purpose of a suit is the reformation of a contract, the court, on denying such relief, will not retain the action to determine whether there is anything due to the plaintiff on the contract.⁸ But, if equities exist in favor of the plaintiff, and all necessary persons have been joined as parties to the action, in a proper case, the court, while refusing the reformation of the contract, may decree its rescission.⁹

3. Form of decision.¹⁰

(Title.)

This cause having been tried at a Special Term of this court, held at the City of New York, before the Honorable Charles Donohue, on the seventh day of January, 1876, and the court having heard and considered the allegations and proofs of the respective parties, finds and declares as follows:

First. That heretofore, and on or about the twenty-eighth day of June, 1867, the plaintiff was the owner and holder of a mortgage, made by Nathan Smith and Jane Smith, for the sum of \$2,500, being the amount of a loan made by the plaintiff to the mortgagors, which said mortgage covered premises in the village of Mount Vernon, in the County of Westchester, upon which, at the time of the making and execution of said mortgage and the policies hereinafter mentioned, there was a two-story and attic frame building.

5. *Mills v. Kampfe*, 202 N. Y. 46; *Gallup v. Bernd*, 1 N. Y. Supp. 478.

And see, *supra*, III-B-3, Deeds—acreage.

6. *Oakville Co. v. Double-pointed Tack Co.*, 105 N. Y. 658.

7. *Husted v. Van Ness*, 1 App. Div. 120, 36 N. Y. Supp. 1043, 72 St. Rep. 28, affirmed, 158 N. Y. 104.

8. *Getman v. Beardsley*, 2 Johns. Ch. 274.

9. *Prindle v. Board of Education*, 61 Misc. 533, 115 N. Y. Supp. 888; *Abrams v. Rhoner*, 44 Hun 507.

10. This form is adapted from that used in *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235.

Second. That said mortgage contained a clause, commonly known as an insurance clause, in the words following:

"And it is expressly agreed by and between the parties to these presents, that the said parties of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured against loss and damage by fire by insurers, and in an amount approved by the said party of the second part, and in default thereof it shall be lawful for the said party of the second part to effect such insurance, and the premium and premiums paid for effecting the same shall be a lien on the said mortgaged premises, added to the amount of the said bond or obligation, and secured by these presents, and payable on demand, with interest at the rate of seven per cent per annum."

Third. That at the date hereinbefore mentioned, the defendants herein, in consideration of the sum of twenty-five dollars premium paid therefor, made, executed, and delivered to the plaintiff their certain policy of insurance on said building, a copy whereof is annexed to the complaint herein, marked "A."

Fourth. That said insurance was effected through one Allan Hay, the husband of the plaintiff, at the instance of the mortgagors above named, who paid the above mentioned premium thereon upon the understanding and condition that such insurance should enure to their benefit.

Fifth. That at or about the time of the expiration of the policy of insurance aforesaid, Nathan Smith and Jane Smith, the above named mortgagors, made and executed to the plaintiff a further mortgage, upon the same premises, for the additional sum of five hundred dollars, loaned and advanced by the plaintiff to said mortgagors, which said last mentioned mortgage also contained an insurance clause similar to that contained in the first mentioned mortgage.

Sixth. That the plaintiff thereupon applied to the defendants for a renewal of the insurance upon the mortgaged premises aforesaid, so as to cover her additional interest as such mortgagee, and upon such application the defendants agreed with the plaintiff, in consideration of the premium of thirty dollars paid therefor, that they would renew the said insurance upon the like terms and conditions as the former insurance, for the period of one year, namely, from the first day of June, 1868, to the first day of June, 1869, and that the risk to be covered by such renewed insurance should be increased to the sum of three thousand dollars, the aggregate amount of the mortgage indebtedness aforesaid; and that said defendants thereupon received and were paid the premium aforesaid, and did renew said insurance for such increased amount for the period aforesaid, upon the like terms and conditions as the former insurance, and defendants agreed to make out and deliver to the plaintiff a policy of insurance in accordance with said agreement.

Seventh. That said last named insurance was also effected through Allan Hay, hereinbefore mentioned, and at the instance of the mortgagors, who paid the above mentioned premium of thirty

dollars, upon the understanding and condition that such insurance should enure to their benefit.

Eighth. That said renewal policy was not made out by defendants at the time the agreement therefor was made, but subsequently thereto, and some days thereafter the defendants made and delivered to plaintiff a policy, a copy whereof is annexed to the complaint herein, marked "B," and plaintiff received the same, supposing that said policy conformed to the agreement made by defendants.

Ninth. That said policy differs from the agreement made by the defendants as aforesaid, and from the former policy issued by them, and especially in this particular—that said last named policy contains the following clause, namely:

"In all cases of loss, the assured shall assign to this Company all his right to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of this Company. When insured as a mortgagee, the loss shall not be payable until payment of such portion of the debt shall have been enforced as can be collected out of the original security to which this policy may be held as collateral, and this Company shall then only be liable to pay such sum, not exceeding the amount insured, as cannot be collected out of such primary security."

And which said clause and condition did not enter into or form any part of such original policy, or the agreement for the renewal thereof.

Tenth. That said renewal policy was changed and modified in the particulars aforesaid without the authority of plaintiff, and without her knowledge or consent.

Eleventh. That plaintiff did not examine said policy when the same was so delivered, and had no knowledge that the same contained the clause and condition hereinbefore mentioned, or that the same was not made out in conformity with the agreement made by the defendants, until subsequently to the loss by fire hereinafter mentioned.

Twelfth. That said policy of insurance was renewed by the defendants from time to time, and such renewals were effected by the ordinary renewal receipts, and not by issuing new policies, and that on the first day of June, 1873, said insurance was renewed in like manner by defendants for the further period of one year, and that each and every of the premiums, upon the occasion of each successive annual renewal, was paid by the mortgagors above mentioned, and upon the understanding and condition that the insurance should enure to their benefit.

Thirteenth. That on or about the ninth day of October, 1873, the building on the mortgaged premises mentioned and referred to in the policy aforesaid was wholly destroyed by fire, and such fire happened without any fault of plaintiff or of the mortgagors.

Fourteenth. That the value of the building so insured, at the time of its destruction by fire, was not less than the sum of six thousand dollars.

Fifteenth. That due notice of said loss was given to the de-

fendants, and that the plaintiff has also delivered to the defendants, and that the plaintiff has also delivered to the defendants an account and particulars of said loss, as required by the terms and conditions of said policy, and that at the time of the commencement of this action more than sixty days had elapsed since such proofs were so delivered.

Sixteenth. That the plaintiff is still the owner and holder of the mortgages hereinbefore mentioned, and that the same have never been paid.

And the Court doth further find and decide, as matter of law:

First. That the plaintiff is entitled to judgment; that the policy so made and issued by defendants, of which Exhibit "B," annexed to the complaint, is a copy, should be reformed so as to conform to the agreement made by defendants by striking therefrom the clause hereinbefore specifically set forth, namely:

"In all cases of loss, the assured shall assign to this company all his right to receive satisfaction therefor from any other person or persons, town, or corporation, with a power of attorney to sue for and recover the same at the expense of this Company.

"When insured as a mortgagee, the loss shall not be payable until payment of such portion of the debt shall have been enforced as can be collected out of the original security to which this policy may be held as collateral, and this company shall then only be liable to pay such sum, not exceeding the amount insured, as cannot be collected out of such primary security."

Second. That plaintiff is also entitled to judgment against the defendants for the sum of three thousand dollars, being the amount of loss sustained by her under said policy, together with interest thereon from the sixth day of June, 1874, amounting at the date hereof, in the aggregate, to the sum of three thousand three hundred thirty-two dollars and fifty cents, together with her costs, to be adjusted, and an additional allowance of one hundred sixty-six dollars and sixty cents, hereby awarded to said plaintiff.

Dated January 7, 1876.

CHAS. DONOHUE,
J. S. C.

4. Form of judgment.¹¹

(Title.)

This action having been tried at a Special Term of this court, held at the Court House in the City of New York, on the 7th day of January, 1876, before the Hon. Charles Donohue, one of the justices thereof, and the said justice having filed his decision herein, containing his findings of fact and conclusions of law, whereby it appears that the plaintiff is entitled to the relief and judgment asked for in the complaint:

11. This form is adapted from that used in *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235.

Now, therefore, upon motion of Burill, Davison & Burrill, attorneys for said plaintiffs,

It is ordered and adjudged, that the policy of insurance made and issued by defendants to plaintiff under date of June 1, 1868, insuring the plaintiff against loss or damage by fire to the amount of three thousand dollars on her interest as mortgagee in the buildings upon the mortgaged premises in the complaint mentioned, and a copy of which said policy of insurance, marked Exhibit B, is annexed to and forms a part of the complaint, be, and the same is hereby reformed so as to conform to the agreement made and entered into by the defendants with the plaintiff in respect of said insurance, by striking from and out of said policy the following clauses, viz.:

"In all cases of loss, the assured shall assign to this Company all his rights to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of this Company.

"When insured as a mortgagee, the loss shall not be payable until payment of such portion of the debt shall have been enforced as can be collected out of the original security to which this policy may be held as collateral, and this Company shall then only be liable to pay such sum, not exceeding the amount insured, as cannot be collected out of such primary security."

And it is further ordered and adjudged, that the plaintiff do recover judgment against the defendants for the sum of three thousand dollars, the amount of loss sustained by her under said policy, together with interest thereon from the sixth day of June, 1874, being the sum of three thousand three hundred thirty-two dollars and fifty cents, and that plaintiff also recover against the defendants her costs herein, adjusted at the sum of one hundred seventy-seven dollars and twenty-three cents, and also the additional allowance of five per cent upon the amount adjudged, being the sum of one hundred sixty-six dollars and sixty cents, which said several sums amount in the aggregate to three thousand six hundred seventy-six dollars and thirty-three cents, and that plaintiff have execution therefor.

I. Costs.

As in other classes of equitable actions, costs in an action of reformation are discretionary under section 1477 of the Civil Practice Act.¹² If both parties were at fault or in error as to their alleged rights, the judgment may be without costs to either.¹³ The discretion of the trial justice, however, is not arbitrary, and in a proper case the Appellate

12. *Husted v. Van Ness*, 1 App. Div. 120, 36 N. Y. Supp. 1043, 72 St. Rep. 28, affirmed, 158 N. Y. 104; *Getman v. Beardsley*, 2 Johns. Ch. 274.

13. *Johnson v. Taber*, 10 N. Y. 319; *Harvey v. Beekman*, 64 Misc. 395, 118 N. Y. Supp. 602.

Division may award a successful defendant his costs although they were denied in the court below.¹⁴

J. Appeals.

On appeal to the Appellate Division, the facts may be reviewed and a reversal may be had if it is thought that the evidence of mistake or fraud is not sufficient to justify the reformation.¹⁵ But, on a further appeal to the Court of Appeals, although it is the rule that reformation cannot be had in the absence of clear and convincing evidence of the mistake,¹⁶ yet if the trial court has found the evidence sufficient to comply with the rule and its determination has been sustained by the Appellate Division, the Court of Appeals will not interfere, there being some evidence of the mistake.¹⁷ A unanimous decision of the Appellate Division made prior to July 15, 1926, that there is evidence supporting a finding of fact is not reviewable in the Court of Appeals.¹⁸

Appellate courts are slow to change the theory of an action and give final judgment, unless it is quite apparent that the parties have not been misled, and that they have had a full and adequate opportunity to meet and answer the new view.¹⁹ Where the plaintiff has elected to bring an equitable action for the reformation of a contract, and it is tried as such, it is too late upon appeal to seek to convert it into a law action.²⁰ If an action tried as one for reformation is unsuccessful, an appellate court should not render a judgment of specific performance on the theory that the contract needed no reformation.²¹ When an action has been tried by the unsuccessful party upon the theory that an instrument required reformation, and his effort to reform the instrument has failed, he cannot change his theory of the case in the Court of Appeals, and is not entitled to invoke a judicial construction that, as originally

14. *Husted v. Van Ness*, 1 App. Div. 120, 36 N. Y. Supp. 1043, 72 St. Rep. 28, affirmed, 158 N. Y. 104.

15. *Hackett v. View*, 109 App. Div. 351, 95 N. Y. Supp. 675.

16. See, *infra*, VI-C, Sufficiency of Evidence.

17. *Van Tuyl v. Westchester F. Ins. Co.*, 55 N. Y. 657.

18. *Consolidated Elec. Storage Co. v. Atlantic Trust Co.*, 161 N. Y. 605; Civil Practice Act, § 589.

19. *Wells v. Fisher*, 237 N. Y. 79.

20. *Roberts v. Derby*, 68 Hun 299, 23 N. Y. Supp. 34, 52 St. Rep. 95.

21. *Wells v. Fisher*, 237 N. Y. 79.

drawn, the contract needed no reformation and could be read as if reformed.²²

Where a reformation of a contract was asked and was granted, although no case for a reformation was made, the contract as written being capable of a construction which will accord with the intention of the parties thereto, the person who, upon an appeal, objects to the reformation must show that he was injured by it, as there is no presumption that he was thus injured.²³

It being within the discretion of the Appellate Division to modify a judgment in an equity action by making it with instead of without costs, such a modification is not reviewable in the Court of Appeals.²⁴

ARTICLE VI.

EVIDENCE.

A. Parol evidence.

An action to reform a written instrument affords one of the prominent exceptions to the rule forbidding the reception of evidence tending to vary the contents of a writing.²⁵ The plaintiff is permitted to show the prior oral negotiations of the parties. Were the oral evidence inadmissible, the plaintiff would be unable to prove his cause of action. If the contract was prepared through the medium of a stenographer, evidence may be received as to the actual dictation given to the stenographer.²⁶ If oral evidence is unnecessary for the establishment of the cause of action, there is no necessity for the action, and the court may decline relief.²⁷ Oral evidence as to the acts of the parties showing the interpretation which they have given the contract during a considerable period of time, may afford persuasive evidence of mistake in the writing.²⁸ The circumstances surrounding

22. *Greene v. Smith*, 160 N. Y. 533.

23. *Tilden v. Tilden*, 8 App. Div. 99, 40 N. Y. Supp. 403.

24. *Husted v. Van Ness*, 158 N. Y. 104.

25. *Beatty v. Ireland*, 152 App. Div. 588, 137 N. Y. Supp. 456; *Board of Education of Middletown v. Todd*, 190 App. Div. 90, 179 N. Y. Supp. 320;

Pennell v. Wilson, 2 Rob. 505; *Titus v. Perry*, 13 St. Rep. 237.

26. *Schall v. Schwartz & Co.*, 177 App. Div. 765, 165 N. Y. Supp. 35.

27. See, *supra*, I-E, Relief Unnecessary.

28. *Bayrhoff v. Rohde*, 16 N. Y. Supp. 851.

the execution and delivery of the instrument in question may be shown.²⁹

B. Burden of proof.

The law presumes that a written engagement of parties contains a correct statement of their actual agreement,³⁰ and, if a party asserts to the contrary, the burden is upon him of establishing his claim.³¹ If the agreement is of a formal nature, it is presumed that it was carefully and deliberately prepared and executed, and therefore it is evidence of the highest character and will be regarded as expressing the intention of the parties until the contrary appears in the most satisfactory manner.³²

C. Sufficiency of evidence.

Owing to the presumption that a written contract correctly speaks the common intention of the parties thereto, a high degree of proof is placed upon one claiming that instrument is erroneous in this respect.³³ A mere preponderance of evidence is not enough.³⁴ "Courts are chary in reforming

29. *Board of Education of Middletown v. Todd*, 190 App. Div. 90, 179 N. Y. Supp. 320.

30. *Nevius v. Dunlap*, 33 N. Y. 676; *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 51; *Humphreys v. Hurtt*, 50 How. Pr. 291; *Coburn v. Anderson*, 62 How. Pr. 268; *Halliday v. White*, 21 N. Y. Supp. 878, 50 St. Rep. 549.

31. *Roussel v. Lux*, 39 Misc. 508, 80 N. Y. Supp. 341; *Duke v. Stuart*, 45 Misc. 120, 91 N. Y. Supp. 885, affirmed, 105 App. Div. 376, 94 N. Y. Supp. 235, appeal dismissed, 194 N. Y. 495; *Voci v. Page*, 123 Misc. 766, 206 N. Y. Supp. 128; *Berringer v. Schaefer*, 52 How. Pr. 69; *Halliday v. White*, 21 N. Y. Supp. 878, 50 St. Rep. 549; *Coles v. Bowne*, 10 Paige 526.

32. *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 51; *Duke v. Stuart*, 45 Misc. 120, 91 N. Y. Supp. 885, affirmed, 105 App. Div. 376, 94 N. Y. Supp. 235, appeal dismissed, 194 N. Y. 495.

33. *Nevius v. Dunlap*, 33 N. Y. 676; *Mead v. Westchester F. Ins. Co.*, 64 N. Y. 453; *Moran v. McLarty*, 75 N. Y. 25; *Ford v. Joyce*, 78 N. Y. 618; *Paine v. Upton*, 87 N. Y. 327; *Southard v. Curley*, 134 N. Y. 148; *Mitchell v. Niagara, etc., Power Co.*, 191 App. Div. 276, 181 N. Y. Supp. 999; *Caster-ton v. McIntire*, 3 Misc. 380, 23 N. Y. Supp. 301, 54 St. Rep. 148; *Boardman v. Davidson*, 7 Abb. Pr. N. S. 439; *Kent v. Manchester*, 29 Barb. 595; *O'Donnell v. Harmon*, 3 Daly 424; *Kilmer v. Smith*, 11 Jones & S. (43 Super. Ct.) 461, affirmed, 77 N. Y. 226; *Stryker v. Schuyler*, 3 N. Y. Supp. 513, 20 St. Rep. 452, affirmed without opinion, 132 N. Y. 547; *Marvin v. Bennett*, 26 Wend. 169.

34. *Burt v. Quackenbush*, 72 App. Div. 547, 75 N. Y. Supp. 1031, affirmed without opinion, 175 N. Y. 490; *Weed v. Whitehead*, 1 App. Div. 192, 37 N. Y. Supp. 178, 72 St. Rep. 655; *Duke v. Stuart*, 45 Misc. 120, 91 N. Y. Supp. 885, affirmed, 105 App. Div. 376, 94

written contracts.”³⁵ While the proponent is not required to establish his case beyond a reasonable doubt, that degree of proof being required only in criminal prosecutions,³⁶ nevertheless, the evidence must be, according to the usual formula, “clear and convincing.”³⁷ At various times the courts, with a change of language but no practical change in meaning, have stated the rule as requiring “clear and unequivocal,”³⁸ “clear and satisfactory,”³⁹ “clear and decisive,”⁴⁰ “clear and certain,”⁴¹ “clear, irrefragible and convincing,”⁴² “clear, positive and convincing,”⁴³ “sub-

N. Y. Supp. 235, appeal dismissed, 194 N. Y. 495; *Voci v. Page*, 123 Misc. 766, 206 N. Y. Supp. 128; *Devereux v. Sun Fire Office*, 51 Hun 147; *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 78 Hun 462, 29 N. Y. Supp. 233, 60 St. Rep. 774, affirmed, 149 N. Y. 51.

35. *Coast v. McCaffery*, 46 App. Div. 436, 61 N. Y. Supp. 881.

36. *Southard v. Curley*, 134 N. Y. 148; *Jamaica Sav. Bank v. Taylor*, 72 App. Div. 567, 76 N. Y. Supp. 790; *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 78 Hun 462, 29 N. Y. Supp. 233, 60 St. Rep. 774, affirmed, 149 N. Y. 51. In some of the earlier cases, the courts have said that the case should be proved “beyond a reasonable doubt.” *Berringer v. Schaefer*, 52 How. Pr. 69; *Coles v. Bowne*, 10 Paige 526.

37. *Allison Bros. v. Allison*, 144 N. Y. 21; *Greene v. Smith*, 13 App. Div. 459, 43 N. Y. Supp. 610; *Weed v. Whitehead*, 1 App. Div. 192, 37 N. Y. Supp. 178, 72 St. Rep. 655; *Carey Mfg. Co. v. Merchants’ Ins. Co.*, 42 App. Div. 201, 59 N. Y. Supp. 7; *Scott v. Finocchiaro*, 118 Misc. 322, 193 N. Y. Supp. 81; *Jamaica Sav. Bank v. Taylor*, 72 App. Div. 567, 76 N. Y. Supp. 790; *Drachler v. Foote*, 88 App. Div. 270, 84 N. Y. Supp. 977; *Fox v. Coggeshall*, 95 App. Div. 410, 89 N. Y. Supp. 676; *Beatty v. Ireland*, 152 App. Div. 588, 137 N. Y. Supp. 456; *Halbe v. Adams*, 176 App. Div. 588, 163 N. Y.

Supp. 895; 154 West 14th St. v. D. A. Schulte, Inc., 121 Misc. 853, 202 N. Y. Supp. 737, affirmed, 210 App. Div. 851, 206 N. Y. Supp. 942; *Heelas v. Slevin*, 53 How. Pr. 356; *Miaghan v. Hartford F. Ins. Co.*, 12 Hun 321; *Bartholomew v. Mercantile Marine Ins. Co.*, 34 Hun 263; *Simpkins v. Taylor*, 81 Hun 467, 31 N. Y. Supp. 169, 63 St. Rep. 491; *Jenkins v. Lefaiver*, 9 N. Y. Supp. 19, 29 N. Y. St. Rep. 886; *Bayrhoff v. Rhode*, 16 N. Y. Supp. 851; *Disbrow v. Disbrow*, 146 N. Y. Supp. 63.

38. *Humphreys v. Hurtt*, 50 How. Pr. 291.

39. *Burt v. Quackenbush*, 72 App. Div. 547, 75 N. Y. Supp. 1031, affirmed without opinion, 175 N. Y. 490; *Coburn v. Anderson*, 62 How. Pr. 268; *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige 278.

40. *Lyman v. United Ins. Co.*, 17 Johns. 373.

41. *Getman v. Beardsley*, 2 Johns. Ch. 274.

42. *Fishell v. Bell, Clarke* 37.

43. *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 51; *Kues v. Foran Foundry & Mfg. Co.*, 191 App. Div. 25, 180 N. Y. Supp. 695; *Roussel v. Lux*, 39 Misc. 508, 90 N. Y. Supp. 341; *Dougherty v. Lion Fire Ins. Co.*, 41 Misc. 285, 84 N. Y. Supp. 10, affirmed on opinion below, 95 App. Div. 618, 88 N. Y. Supp. 1096, reversed on other grounds, 183 N. Y. 302; *Duke v. Stuart*, 45 Misc. 120, 91 N. Y. Supp. 885, affirmed, 105 App. Div. 376, 94 N. Y. Supp. 235, appeal

stantial and convincing,"⁴⁴ "entirely satisfactory,"⁴⁵ "clear-est and most satisfactory,"⁴⁶ "explicit,"⁴⁷ "plain, convincing and satisfactory,"⁴⁸ evidence.

The fact that is a conflict in the evidence does not require the court to hold that the burden of proof has not been met.⁴⁹ But, if the conflict in the evidence is such as to leave a substantial doubt, the relief may properly be withheld.⁵⁰ Contracts solemnly entered into, which have existed, and been acted upon, unchallenged, for years, are not to be changed by inserting important provisions, and especially, as against an assignee of one of the parties, simply upon the oath of an interested party, when his testimony is denied, by the testimony of the other party to the contract, unless there are circumstances which substantially demonstrate the truth of the evidence of the party who testifies to the existence of a mutual mistake.⁵¹

To justify the reformation of a written instrument it is well settled that the plaintiff is bound to establish: (1) The mutual agreement of all parties to the instrument, to the precise contract alleged to have been, in fact, the original agreement. (2) That the written instrument fails to express the common agreement, because of accident or of mutual mistake of all the parties, or by mistake on one side, induced by the fraud of the other. The burden rests upon the plaintiff to establish both of these propositions, not simply by a preponderance of evidence, but by proof so clear and convincing as to thoroughly satisfy the mind of the court.⁵²

dismissed, 194 N. Y. 495; *Fitzgerald v. Arcade Theatre Co.*, 153 N. Y. Supp. 618, affirmed without opinion, 172 App. Div. 932, 156 N. Y. Supp. 1122.

44. *Christopher & Tenth St. R. Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 51; *Raby v. Greater N. Y. Development Co.*, 151 App. Div. 72, 135 N. Y. Supp. 813, affirmed without opinion, 210 N. Y. 586.

45. *Lyman v. United Ins. Co.*, 2 Johns, Ch. 630, affirmed, 17 Johns. 373; *Pennell v. Wilson*, 2 Rob. 505.

46. *Sterback v. Friedman*, 23 Misc. 172, 50 N. Y. Supp. 1025, modified, 34 App. Div. 534, 54 N. Y. Supp. 608; *Roberts v. Derby*, 68 Hun 299, 23 N. Y. Supp. 34, 52 St. Rep. 95.

47. *Coburn v. Anderson*, 62 How. Pr. 268.

48. *Halliday v. White*, 21 N. Y. Supp. 878, 50 St. Rep. 549.

49. *Devereux v. Sun Fire Office*, 51 Hun 147.

50. *Weed v. Whitehead*, 1 App. Div. 192, 37 N. Y. Supp. 175, 72 St. Rep. 655; *Greene v. Smith*, 13 App. Div. 459, 43 N. Y. Supp. 610; *Little v. Webster*, 1 N. Y. Supp. 315, 16 St. Rep. 107, affirmed without opinion, 122 N. Y. 670.

51. *Greene v. Smith*, 13 App. Div. 459, 43 N. Y. Supp. 610, affirmed, 160 N. Y. 533.

52. *Raby v. Greater N. Y. Development Co.*, 151 App. Div. 72, 135 N. Y.

The plaintiff must show that the intention, which he claims is incorrectly represented in the contract, continued until the execution of the contract, and the precise form in which the contract should have been drawn.⁵³

Supp. 813, affirmed without opinion, 299, 23 N. Y. Supp. 34, 52 St. Rep. 210 N. Y. 536; *Simpkins v. Taylor*, 81 95.
Hun 467, 31 N. Y. Supp. 169, 63 St. 53. *Roberts v. Derby*, 68 Hun 299, Rep. 491; *Roberts v. Derby*, 68 Hun 23 N. Y. Supp. 34, 52 St. Rep. 95.

RESCISSION.

ARTICLE I.

General Principles.

	PAGE
A. Scope of chapter.....	503
B. Nature of action.....	504
C. Jurisdiction of courts.....	505
D. Partial rescission	506
E. Necessity of relief.....	506
1. Adequate remedy at law.....	506
2. Illegality appearing on face of instrument.....	508
3. Illegality a matter of record.....	508
4. When legality must be shown by holder before enforcement....	509
5. Mortgages	509
6. Notes and negotiable securities.....	510
7. Municipal bonds	511
8. Special assessments and tax certificates.....	512
9. Fraud	512
10. Usurious loan	514
11. Receipt	515
F. Restoration of benefits received by plaintiff.....	516
1. In general	515
2. Retention of what plaintiff is entitled to in any event.....	516
3. Restoration impossible.....	517
4. Incompetent persons	520
5. Separation agreements	520
6. Usurious obligations	520
7. Offer of restoration in complaint.....	521
8. Extent of restoration.....	523
G. Election of remedies.....	523
1. Remedies available	523
2. What constitutes an election.....	525
3. Effect of election.....	525
H. Waiver, ratification, acquiescence, estoppel.....	526
1. In general	526
2. Knowledge essential	527
3. Delay in asserting claim.....	528
4. Laches	529
5. Retention of benefits from contract.....	530
6. Retaining possession of property.....	531
7. Transfer of contract.....	533
8. Purchase of property subject to mortgage.....	533
9. Insurance policies	533
10. Estoppel	533
I. Parties <i>in pari delicto</i>	534
J. Discretion of court.....	536

ARTICLE II.

Grounds for Rescission.

	PAGE
A. Fraud or misrepresentation.....	537
1. In general	537
2. Misrepresentation not amounting to fraud.....	538
3. Materiality of representations.....	539
4. Falsity of statements.....	540
5. Reliance on representations.....	540
6. Negligence in discovery of fraud.....	540
7. Misrepresentation of law.....	541
8. Statements of future events.....	542
9. Fraud of agent.....	542
10. Condition or value of property purchased.....	543
11. Marketability of title.....	545
12. Insurance policies	545
13. Transfer of securities.....	546
14. Judgments	546
15. Evidence of fraud.....	547
16. Sufficiency of proof of fraud.....	547
B. Mistake	548
1. Mutual mistake	548
2. Unilateral mistake	550
3. Mistake of law.....	551
C. Duress	551
D. Undue influence	553
E. Transactions between persons in confidential relations.....	554
1. In general	554
2. Attorney and client.....	556
3. Physician and patient.....	556
4. Trustee and <i>cestui que trust</i>	557
5. Promoters and stockholders.....	558
6. Partners	558
7. Co-tenant	558
8. Husband and wife.....	559
9. Parent and child.....	560
10. Collateral relatives	561
F. Incompetency	561
G. Infancy	563
H. Breach of contract.....	563
1. In general	563
2. Oral stipulation not included in written agreement.....	565
3. Contracts for support of grantor.....	566
I. Want of consideration.....	567
J. Inadequacy of consideration.....	568
K. Payment	569
L. Usury	571
M. Ultra vires	571
N. Illegality	572

ARTICLE III.

Procedure.

	PAGE
A. Statute of limitations.....	573
B. Parties	575
1. Plaintiffs	575
2. Defendants, in general.....	577
3. <i>Bona fide</i> purchasers.....	579
C. Pleadings	580
1. Essential allegations of complaint.....	580
2. Joinder of causes of action.....	582
3. Variance	583
4. Counterclaim	584
5. Form of complaint in action to cancel a separation agreement..	584
6. Form of complaint in action to cancel contract for sale of land..	586
D. Venue	588
E. Provisional remedies	589
F. Trial of issues.....	590
G. Relief granted	590
1. In general	590
2. Relief in addition to rescission.....	591
3. Relief in lieu of rescission.....	592
4. Relief to defendant.....	593
5. Costs	595
6. Form of judgment.....	595

ARTICLE I.

GENERAL PRINCIPLES.

A. Scope of chapter.

It is the purpose of this Chapter to discuss the equitable remedy of rescission, or, as it is frequently termed, cancellation. In proper cases, courts of equitable jurisdiction have undoubted power to decree the rescission of written instruments. In other chapters of *Fiero on Particular Actions and Proceedings*, particular cases where a similar power has been exercised have been considered.

In the chapter on judgment creditor's action is discussed the power of the court to set aside conveyances as in fraud of creditors. While that remedy, as well as the remedy now under consideration, is generally based on fraud, and while both seek the rescission of an instrument, yet they are essentially different. The circumstance that in the judgment creditor's action, the attack is made by one not a party to the instrument, but who by virtue of his position

as a creditor can complain that the collection of his judgment has been fraudulently impaired, creates an entirely different situation from the claim of a party that the execution of an agreement by him was the result of the fraud of the other party.

The authority of the courts to set aside an award in an arbitration proceeding, is also treated in another chapter.¹ Likewise the remedy of a stockholder to attack a transfer or agreement made by a corporation or its officers, is covered in another place.² In another place is considered the remedy of a taxpayer when municipal authorities have exceeded their power.³

Where the instrument sought to be cancelled, is a process, judgment, or other paper in an action, the remedy is usually by motion, rather than by a suit in equity. The remedy by motion is not covered in this chapter, for at this place the only remedy treated is the equitable action of rescission. Yet, in some cases, the remedy to vacate a judgment is not by motion, but by a suit in equity.⁴

B. Nature of action.

An action of rescission is purely of equitable cognizance. It seeks a decree of the court directing the cancellation of a written instrument. Other relief, if any, which may be granted is incidental. In the administration of precautionary or protective justice, courts of equity entertain jurisdiction of actions for the rescission of written instruments, because a party has fears of future injury from their vexatious use, when evidence to impeach them is lost.⁵ In many of the earlier cases the action is referred to as an action for the "delivery up" of written instruments.⁶

1. See the Chapter on Arbitration.

2. See the Chapter on Corporations.

3. See the Chapter on Public Officers.

4. *Ellias v. Thomas Furniture Works*, 125 Misc. 683, 212 N. Y. Supp. 127.

A satisfaction of judgment will not be canceled on motion on the ground that it was given on a condition which was not fulfilled or on promises which

were not performed, for the issues relate to occurrences wholly unconnected with the judgment and wholly outside of the questions litigated and can properly be determined only upon a trial upon appropriate pleadings. *Greenfield v. Stern*, 126 Misc. 561, 214 N. Y. Supp. 37.

5. *Becker v. Church*, 115 N. Y. 562; *Schenck v. O'Neill*, 23 Hun 209.

6. *Seymour v. Delancey*, 3 Cow. 445; *Noah v. Webb*, 1 Edw. Ch. 604; *Wilkes v. Wilkes*, 4 Edw. Ch. 630; *Hamilton*

The action is to be distinguished from an action to determine a claim to real property, which is maintainable under sections 500 *et seq.* of the Real Property Law.⁷ Moreover, the action under the Real Property Law, as well as an action of rescission, are both to be distinguished from the equitable action to remove a cloud from title.⁸

C. Jurisdiction of courts.

The Supreme Court, succeeding to powers of the Court of Chancery, is invested with jurisdiction of an action of Rescission.⁹ In matters of fraud, the jurisdiction of the Court of Chancery was probably coeval with its existence.¹⁰ In a proper case, the Supreme Court may exercise this jurisdiction, although the contract relates to lands situated in a foreign State or country,¹¹ and although the contract was not made in this State,¹² and although the action is against a foreign corporation or a foreign receiver of such a corporation.¹³

v. Cummings, 1 John. Ch. 517; Schenck v. O'Neill, 23 Hun 209.

7. See, Fiero on Particular Actions and Proceedings, vol. I, page 257; Livingston v. Moore, 15 App. Div. 15, 44 N. Y. Supp. 125, appeal dismissed, 161 N. Y. 602.

8. See, vol. I, page 258.

9. "The power of a court of equity to compel the surrender and cancellation of deeds and other written instruments, obtained by fraud or held for inequitable and unconscientious purposes, is undoubted. The jurisdiction is an ancient one, and is grounded upon the inherent power of the court to take cognizance of frauds, and to administer the peculiar remedies which belong to a court of equity in preventing and suppressing them." McHenry v. Hazard, 45 N. Y. 580.

10. Mayne v. Griswold, 3 Sandf. (5 Super. Ct.) 463.

11. Pruyn v. McCreary, 105 App. Div. 302, 93 N. Y. Supp. 995, affirmed without opinion, 182 N. Y. 568; Williams v. Ayrault, 31 Barb. 364. "There can be no doubt whatever of the right and power of this court, in a proper

case before it, to decree a mortgage upon real estate void for usury, and to compel the party holding it to surrender it up to be canceled, although the lands mortgaged lie in another state. If the cause is one of equitable cognizance, and the parties are within the jurisdiction of the court, such court will exercise its authority, although the property in controversy lies beyond its jurisdiction. This power has been frequently exercised to compel parties to perform their contracts specifically, and execute conveyances of lands in other states, and also to set aside fraudulent conveyances of lands in other states. And the same principle would clearly authorize the cancellation of a void mortgage, which was an apparent lien and cloud upon the property beyond the jurisdiction of the court, Williams v. Ayrault, 31 Barb. 364.

12. Pruyn v. McCreary, 105 App. Div. 302, 93 N. Y. Supp. 995, affirmed without opinion, 182 N. Y. 568.

13. Pruyn v. McCreary, 105 App. Div. 302, 93 N. Y. Supp. 995, affirmed without opinion, 182 N. Y. 568.

Only courts of equity have jurisdiction of actions to cancel written instruments.¹⁴ County courts are without power to determine an action of rescission. Likewise, the City Court of the City of New York, is without jurisdiction of such an action.¹⁵

D. Partial rescission.

The infirmities in a written instrument which justify an action of rescission are such, that, if any part of the instrument is cancelled, the entire instrument must be cancelled. The rescission must be *in toto*.¹⁶ A party will not be allowed to rescind a part of a contract, and secure and retain benefits from other parts.¹⁷

E. Necessity of relief.

1. Adequate remedy at law.

It is a general principle in the administration of equity that equity will not assume jurisdiction of a controversy, if there is an adequate remedy at law.¹⁸ As a general rule, a

14. *Piper v. Hoard*, 65 How. Pr. 228; *Dickson v. Valentine*, 25 Jones & S. (57 Super. Ct.) 128, 6 N. Y. Supp. 540, 24 St. Rep. 957.

15. *Smith v. Salomon*, 184 App. Div. 544, 172 N. Y. Supp. 515.

16. *Francis v. New York, etc.*, Elev. R. Co., 103 N. Y. 93; *Yeomans v. Bell*, 151 N. Y. 230; *Merry Realty Co. v. Shamokin, etc, Co.*, 230 N. Y. 316; *Maass v. Rosenthal*, 125 App. Div. 452, 109 N. Y. Supp. 917; *Goins v. Atwood*, 204 App. Div. 439, 197 N. Y. Supp. 781; *Friedman v. Richman*, 213 App. Div. 467, 210 N. Y. Supp. 648, affirmed, 241 N. Y. 576; *Cogswell v. Cogswell*, 130 Misc. 541, 224 N. Y. Supp. 59; *Bradley v. Bosley*, 1 Barb. Ch. 125.

17. *Clarkson v. Mitchell*, 3 E. D. Smith 269. And see, *infra*, I-F-8, Restoration of benefits received by plaintiff—extent of restoration.

18. *Brady v. McCosker*, 1 N. Y. 214; *Union Ferry Co. v. Fairchild*, 191 App. Div. 639, 182 N. Y. Supp. 125; *Smith v. Johannsen*, 199 App. Div. 823, 192 N. Y. Supp. 478; *Dennin v. Woodbury*,

96 Misc. 247, 160 N. Y. Supp. 647; *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636; *Metropolitan El. Ry. Co. v. Manhattan Ry. Co.*, 14 Abb. N. C. 103, 11 Daly 373; *Hoffman v. Treadwell*, 7 Jones & S. (39 Super. Ct.) 183; *Mayne v. Griswold*, 3 Sandf. (5 Super. Ct.) 463; *East River Nat. Bank v. Columbia T. Co.*, 171 N. Y. Supp. 384.

Effect of extension of jurisdiction at law.—It is one of the doctrines of a court of equity that where a plaintiff has a plain, adequate, and complete remedy at law, a court of equity generally will not interfere, and for this reason they will not as a general rule sustain a bill for damages merely, whether for breach of contract or for tort, a court of law giving in such case full and adequate relief. The application of this rule, however, must be controlled and governed by another equally well established; that if the jurisdiction originally has properly attached in equity on account of the supposed defect of remedy at law, that jurisdiction is not changed or taken

court of equity will not interfere to decree the cancellation of a written instrument, unless some special circumstances exist establishing the necessity of a resort to equity to prevent an injury which might be irreparable, and which equity alone is competent to avert.¹⁹ A rescission will not be directed unless it appears that such relief is necessary.²⁰ The mere fact that a defense exists to the instrument is insufficient.²¹ Nor is it sufficient that the evidence to establish the defense may be lost by delay, especially in a case where evidence may be perpetuated.²² Yet, if a defense exists and there is risk of losing evidence, and it also appears that

away by the fact that courts of law have subsequently exercised jurisdiction in similar cases. *Mayne v. Griswold*, 3 Sandf. (5 Super. Ct.) 463.

Depriving litigant of jury trial.—The evil of shifting the trial of the transaction set forth in the complaint without peculiar and sufficient reasons from a court of law to a court of equity lies in the fact that thereby the defendants will be deprived of their constitutional right to a jury trial. This will not be tolerated. *Dennin v. Woodbury*, 96 Misc. 247, 160 N. Y. Supp. 647.

19. *Vilas v. Jones*, 1 N. Y. 274; *Town of Venice v. Woodruff*, 62 N. Y. 462; *Globe L. Ins. Co. v. Reals*, 79 N. Y. 202; *Warnock Uniform Co. v. Garifalos*, 224 N. Y. 522; *Reno Oil Co. v. Culver*, 60 App. Div. 129, 69 N. Y. Supp. 969; *Whitney v. Considine Investing Co.*, 176 App. Div. 157, 162 N. Y. Supp. 507; *Field v. Holbrook*, 6 Duer (13 Super. Ct.) 597, 14 How. Pr. 103; *Wilkes v. Wilkes*, 4 Edw. Ch. 630; *Balestier v. Mechanics' Nat. Bank*, 15 St. Rep. 46, affirmed without opinion, 117 N. Y. 640; *Miller v. Rogers*, 18 Week. Dig. 119.

20. *Dennin v. Woodbury*, 96 Misc. 247, 160 N. Y. Supp. 647.

21. *Town of Venice v. Woodruff*, 62 N. Y. 462; *Fowler v. Palmer*, 62 N. Y. 533; *Globe L. Ins. Co. v. Reals*, 79 N. Y. 202; *Reiner v. Galinger*, 151 App. Div. 711, 136 N. Y. Supp. 205; *Hoff-*

man v. Treadwell, 7 Jones & S. (39 Super. Ct.) 183; *Balestier v. Mechanics' Nat. Bank*, 15 St. Rep. 46, affirmed without opinion, 117 N. Y. 640. "We cannot believe that a court of equity is bound to interfere whenever a party, liable to be sued upon a written instrument in a court of law, chooses to allege that the instrument is void." *Field v. Holbrook*, 6 Duer (13 Super. Ct.) 597, 14 How. Pr. 103.

22. *Town of Venice v. Woodruff*, 62 N. Y. 462; *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Globe Life Ins. Co. v. Reals*, 79 N. Y. 202. It is well settled that an action of an equitable nature can not be maintained to cancel an instrument if the circumstances are such that the plaintiff might bring a common law action, and then if the assailed instrument should be interposed as a defense, avail himself of the grounds for cancellation in rebuttal. Or, in other words, an action to procure the cancellation of a written instrument can not be maintained unless some special circumstance exists establishing the necessity of resort to equity to prevent an injury which might be done and which equity alone is competent to prevent. It is not sufficient that a defense exists as against the instrument, or that evidence might be lost. *Balestier v. Mechanics' Nat. Bank*, 15 St. Rep. 46, affirmed without opinion, 117 N. Y. 640.

the defense is one which is to be established, if at all, by oral evidence, the court will usually accept jurisdiction.²³

2. Illegality appearing on face of instrument.

If an instrument is void upon its face, it can do no harm; and a court will not entertain a suit to set it aside.²⁴ Thus, if a deed unlawfully suspends the power of alienation, an action for its rescission is unnecessary.²⁵ Likewise, one co-tenant cannot maintain an action for the cancellation of a mortgage given by his co-tenant.²⁶

On the other hand, if extrinsic facts are necessary to show the illegality of the instrument, a court of equity may, in a proper case, be justified in extending its relief.²⁷

3. Illegality a matter of record.

If recourse to the public records indicates that a conveyance or other instrument is without validity, there is no necessity for an action for its cancellation, for the invalidity may be set up in an action at law when enforcement of the instrument is sought.²⁸ Thus, an agreement for the sale of real estate will not be rescinded on the ground that the title is defective, where the defect is a matter of record.²⁹ Or, if one is protected by the Recording Acts as against a prior unrecorded deed, there is no necessity for an action to cancel

23. *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397.

24. *Cox v. Clift*, 2 N. Y. 118; *Scott v. Onderdonk*, 14 N. Y. 9; *Mellen v. Mellen*, 139 N. Y. 210; *Whitney v. Considine Investing Co.*, 176 App. Div. 157, 162 N. Y. Supp. 507; *Town of Thompson v. Norris*, 11 Abb. N. C. 163; *Hotchkiss v. Elting*, 36 Barb. 38; *Field v. Holbrook*, 6 Duer (13 Super. Ct.) 597, 14 How. Pr. 103; *Johnson v. Stevens*, 13 How. Pr. 132; *Sherman v. Adirondack Ry. Co.*, 92 Hun 39, 36 N. Y. Supp. 692, 71 St. Rep. 746; *Town of Mentz v. Cook*, 22 Week. Dig. 476. "Whatever opinions may have formerly obtained, it now seems established, that whenever it is apparent from the writing or deed itself, that no danger to the title or interest of the complainant is to be apprehended, a court of

equity will not entertain a bill for the cancellation or delivery of the instrument." *Cox v. Clift*, 2 N. Y. 118.

25. *Levy v. Hart*, 54 Barb. 248.

26. *Ward v. Dewey*, 16 N. Y. 519.

27. *Zimmerman v. Kinkle*, 108 N. Y. 282; *Johnson v. Stevens*, 13 How. Pr. 132; *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Smith v. Fellows*, 9 Jones & S. (41 Super. Ct.) 36.

28. *Scott v. Onderdonk*, 14 N. Y. 9; *Ward v. Dewey*, 16 N. Y. 519; *Town of Venice v. Woodruff*, 62 N. Y. 462; *Schroeder v. Gurney*, 73 N. Y. 430; *Hieinbothem v. Village of North Pelham*, 144 App. Div. 698, 129 N. Y. Supp. 715; *Whitney v. Considine Investing Co.*, 176 App. Div. 157, 162 N. Y. Supp. 507; *Van Doren v. New York*, 9 Paige 383.

29. *Bruner v. Meigs*, 64 N. Y. 506

such deed.³⁰ Likewise, under the rule that an unrecorded deed is superior to a judgment subsequent in time, the grantee in such a deed cannot maintain an action to cancel a sheriff's certificate of sale under such a judgment.³¹

On the other hand, where the law raises a presumption of the validity of a conveyance, and its invalidity can be shown only by extrinsic proof, an action for its cancellation is maintainable.³² Thus, the remedy is available if a forged conveyance has been recorded;³³ or if the conveyance was without consideration;³⁴ or was usurious;³⁵ or if a lien which is a matter of record has, in fact, been discharged.³⁶

4. When legality must be shown by holder before enforcement.

When there is no presumption of validity of an instrument, but, on the contrary, a party seeking to enforce it must establish its validity, there is less reason for an opposing party to seek affirmative relief in an action of rescission. In such a case relief may be denied.³⁷ Thus, a deed will not be cancelled if its invalidity appears from the chain of title, and a party relying on the deed must necessarily show the chain of title.³⁸

5. Mortgages.

If, for any reason appearing upon the face of the instrument or from the public records, a mortgage is unenforceable, a party is not entitled to a decree of the court

30. *Johnson v. Crane*, 40 Barb. 78.

31. *Schroeder v. Gurney*, 73 N. Y. 430.

32. *Scott v. Onderdonk*, 14 N. Y. 9; *Ward v. Dewey*, 16 N. Y. 519; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474; *Swartout v. Ranier*, 67 Hun 241, 22 N. Y. Supp. 198, 50 St. Rep. 814, affirmed, 143 N. Y. 499; *Smith v. Fellows*, 9 Jones & S. (41 Super. Ct.) 36.

33. *Remington Paper Co. v. O'Daugherty*, 81 N. Y. 474; *National Bank of West Troy v. Levy*, 127 N. Y. 549.

34. *Swartout v. Ranier*, 67 Hun 241, 22 N. Y. Supp. 198, 50 St. Rep. 814, affirmed, 143 N. Y. 499.

35. *Williams v. Ayrault*, 31 Barb. 364.

36. *Beach v. Cooke*, 28 N. Y. 508; *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

37. *Scott v. Onderdonk*, 14 N. Y. 9; *Hicinbotham v. Village of North Pelham*, 144 App. Div. 698, 129 N. Y. Supp. 715; *Dudley v. Congregation of St. Francis*, 65 Hun 21, 19 N. Y. Supp. 605, 47 St. Rep. 60, affirmed, 138 N. Y. 451.

38. *Sherman v. Adirondack Ry. Co.*, 92 Hun 39, 36 N. Y. Supp. 692, 71 St. Rep. 746. "Nor is there any reason why a party should be allowed to resort to the expensive remedy of a suit in chancery, to procure the relinquishment of a right which, it is obvious, the defendant never possessed, and against which, if asserted, the com-

rescinding the instrument.³⁹ Such relief is unnecessary, for the situation may be shown at any time in defense of an action based on the mortgage. Hence, a tenant in common cannot maintain an action to set aside a mortgage given by his co-tenant.⁴⁰ Similarly, a mortgagee cannot ordinarily maintain an action to cancel a release of a part of the mortgaged premises, for in an action to foreclose the mortgage he can raise the question as to the validity of the release.⁴¹

A mortgage may, however, be cancelled in an equitable action for that purpose, where its invalidity depends upon facts *dehors* the instrument or the records.⁴² Thus, it is thought an issue as to the payment of a mortgage may be determined in an action to cancel the lien.⁴³ Or, if a mortgage was given without consideration, the equitable remedy of rescission is properly invoked.⁴⁴ A mortgage which is the result of forgery is similarly considered.⁴⁵ Likewise, a mortgage procured through fraud may be cancelled in a suit for that purpose.⁴⁶

6. Notes and negotiable securities.

The fact that there exists a defense to the collection of a past due note does not ordinarily justify an action in equity for its cancellation.⁴⁷ Thus, the mere fact that a past

plainant had a perfect legal defense written down in the title deeds of his adversary." *Cox v. Clift*, 2 N. Y. 118.

39. *Ward v. Dewey*, 16 N. Y. 519.

40. *Ward v. Dewey*, 16 N. Y. 519.

41. *Barnes v. Southfield Beach R. Co.*, 65 Misc. 600, 120 N. Y. Supp. 616, affirmed, 136 App. Div. 896, 120 N. Y. Supp. 616, affirmed, 202 N. Y. 301.

42. *Ward v. Dewey*, 16 N. Y. 519; *Smith v. Fellows*, 9 Jones & S. (41 Super. Ct.) 36. "She brings the suit to remove the apparently valid lien of a mortgage, alleged to be void by reason of facts which can only be established by extrinsic evidence. The mortgage constitutes a cloud on her title, and she has reason to apprehend its threatened enforcement. Relief is always accorded in equity under such circumstances, on the principle of preventing irreparable injury, and the

party aggrieved need not wait till attacked, but may initiate measures to secure redress." *Smith v. Fellows*, 9 Jones & S. (41 Super. Ct.) 36.

43. *Levy v. Merrill*, 14 Hun 145. See also, 28 N. Y. 508.

44. *Swartout v. Ranier*, 67 Hun 241, 22 N. Y. Supp. 198, 50 St. Rep. 814, affirmed, 143 N. Y. 499.

45. *National Bank of West Troy v. Levy*, 127 N. Y. 549.

46. *Wolff v. Altman*, 196 App. Div. 549, 187 N. Y. Supp. 902; *Blum v. Hoffkins*, 210 App. Div. 748, 206 N. Y. Supp. 587; *Ranney v. Warren*, 13 Hun 11; *Ranney v. Warren*, 17 Hun 111; *Schenck v. O'Neill*, 23 Hun 209.

47. *Geer v. Kissam*, 3 Edw. Ch. 129; *Cowman v. Kingsland*, 4 Edw. Ch. 627; *Hoffman v. Treadwell*, 7 Jones & S. (39 Super. Ct.) 183; *Crane v. Bunnell*, 10 Paige 333. "With respect to the

due note has been paid but not surrendered to the maker, does not afford sufficient ground for the interposition of equitable relief.⁴⁸ The fact that there are one or more notes similarly situated which are held by different persons, does not justify an action against all of the holders to have the notes declared void.⁴⁹ But, if the note is negotiable in form, an action may be maintained to cancel it and to enjoin its negotiation to a holder in due course.⁵⁰

The rule as to bonds or negotiable securities is similar, equity intervening only when necessary.⁵¹ If a bond is non-negotiable, any defense thereto can be asserted as against a transferee, and resort to equity is unnecessary.⁵² Or, if the invalidity of the instrument is indicated on its face, equity need not interfere.⁵³

7. Municipal bonds.

In a proper case, an action may be maintained to cancel municipal bonds. This may be accomplished where the invalidity does not appear on the face of the bonds or in the public records.⁵⁴ The plaintiff must show that the bonds create at least a *prima facie* liability.⁵⁵ But, an action to rescind bonds will not lie, if the bonds upon their face indicate their invalidity.⁵⁶ Where an instrument of this class is void even in the hands of a *bona fide* holder, and where the burden rests upon the holder in an action for its enforcement to show its validity, equity will not assume jurisdiction.⁵⁷ In such a case the action cannot be sustained, although its purpose is to prevent the holder from resorting to the federal courts for relief, in which courts a different view may be taken as to the validity of the bond.⁵⁸

promissory note spoken of in the bill and prayed to be surrendered and canceled, the complainant stands in no need of the aid of this court. The note is past due and if ever an action is brought on it, he can now make a good defense at law." *Cowman v. Kingsland*, 4 Edw. Ch. 627.

48. *Fowler v. Palmer*, 62 N. Y. 533.

49. *Warnock Uniform Co. v. Garifalos*, 224 N. Y. 522.

50. *Geer v. Kissam*, 3 Edw. Ch. 129.

51. *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636; *Noah v. Webb*, 1 Edw. Ch. 604.

52. *Town of Thompson v. Norris*, 11 Abb. N. C. 163.

53. *Town of Thompson v. Norris*, 11 Abb. N. C. 163.

54. *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397.

55. *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397.

56. *Town of Thompson v. Norris*, 11 Abb. N. C. 163.

57. *Town of Venice v. Woodruff*, 62 N. Y. 462; *Town of Mentz v. Cook*, 22 Week. Dig. 476.

58. *Town of Venice v. Woodruff*, 62 N. Y. 462.

An equitable action will not be sustained to restrain the transfer, to a *bona fide* holder, of an obligation held by the courts of this State invalid in the hands of such a holder, on the ground that a different rule prevails in the federal courts, unless it be established that the present holders are not *bona fide* holders; and this, although a transferee might, while the present holder cannot, resort to the federal courts. The mere fact that numerous independent parties hold separate instruments upon which they might bring separate suits, is not sufficient to justify a court of equity in entertaining an action by the maker to compel them to litigate their claims in a forum which he selects. He must, in addition, make out a case which would sustain the action against one of them alone.⁵⁹

8. Special assessments and tax certificates.

In order to sustain an action to remove the lien upon lands of a municipal assessment as a cloud upon title, it must be made to appear that the assessment proceedings are regular upon their face, but, by a defect disclosed by evidence *dehors* the record, are rendered irregular and invalid; and also that the defect would not necessarily appear in proceedings to enforce the lien.⁶⁰ The owner of land cannot sustain an action to have an instrument purporting to affect it canceled as a cloud upon his title where such instrument is void on its face, or where it is defective for the want of preliminary proceedings, which the party claiming under it would be bound to show. But where the instrument is made presumptive evidence that such proceedings were had, the action lies if the instrument be in fact void for a defect in the proceedings.⁶¹

9. Fraud.

Relief against fraud has always been a recognized feature equity jurisprudence.⁶² While in a few cases involving

59. *Town of Venice v. Woodruff*, 62 N. Y. 462.

60. *Marsh v. Brooklyn*, 69 N. Y. 280; *Johnson v. Stevens*, 13 How. Pr. 132.

61. *Scott v. Onderdonk*, 14 N. Y. 9; *Hicinbotham, v. Village of North Pelham*, 144 App. Div. 698, 129 N. Y.

Supp. 715; *Van Doren v. New York*, 9 Paige 388.

62. *McHenry v. Hazard*, 45 N. Y. 580; *Ranney v. Warren*, 13 Hun 11. "There cannot be any doubt as to the jurisdiction of courts of equity over actions to cancel and set aside instruments on the ground of fraud in their

charges of fraud there may be found a discussion of whether a court of equity should assume jurisdiction of an action of rescission or whether it should require the plaintiff to seek damages in an action at law,⁶³ as a general proposition, courts of equity have assumed the jurisdiction without any discussion of the propriety of its action. The judgments of the courts, rather than their written opinions, indicate that equity will generally take cognizance of an action to cancel an instrument procured by fraud, although the plaintiff may have a remedy for damages, or a defense to an action on the instrument. Resort to equity may be justified in some cases on the theory that an actual cancellation of the instrument is desirable, which relief, of course, cannot be granted in an action at law.⁶⁴ Or, it may be said that in cases of fraud equitable jurisdiction is concurrent with that at law.⁶⁵ Or, the jurisdiction may be sustained on the broad principle of equity jurisprudence which seeks to prevent injustice and to declare the fraudulent character of an instrument.⁶⁶

Equity may be slow to accept jurisdiction of an action involving the sale of chattels,⁶⁷ or the giving of a non-

procurement. Such actions are in the nature of preventive remedies. The existence of the instruments may be a well-founded source of anticipated danger by the party whom they do or whom they are designed to affect. The reason for the maintenance of the action for their avoidance is to be found in the reasonable apprehension that the evidence of the fraud may not be always attainable; or that the defense of fraud may not always be available at law. If the fraudulent instrument affects the title to land, equity entertains the action for its cancellation, in order to remove the cloud thrown upon the plaintiff's title." *Becker v. Church*, 115 N. Y. 562.

63. *East River Nat. Bank v. Columbia T. Co.*, 171 N. Y. Supp. 384.

64. *Forster v. Wilshusen*, 14 Misc. 520, 35 N. Y. Supp. 1083.

65. *Heidenreich v. Doushness*, 134 N. Y. Supp. 472; *Crane v. Bunnell*, 10 Paige 333.

66. "One who has been induced to enter into a contract by false and fraudulent representations upon which he has relied, has the right to bring an action to establish the fraud and to be released from its provisions whether there be a threatened or attempted enforcement of it or not. * * * This right is founded upon the broad principles of equity jurisprudence, which is not merely remedial, but reaches out to prevent injustice and to brand with its fraudulent character an instrument which ought not to be used or enforced, and to prevent its being applied to an improper purpose, and vexatiously litigated at a distant time when the proper evidence to repel the claim may have been lost." *Pruyn v. McCreary*, 105 App. Div. 302, 93 N. Y. Supp. 995, affirmed without opinion, 182 N. Y. 568.

67. "It is not in every case of fraud that relief is to be administered in a court of equity, and it is a well set-

negotiable note,⁶⁸ but will grant relief in the case of the purchase of corporate stock.⁶⁹ No difficulty is encountered when the transaction relates to real estate and may possibly cloud the title.⁷⁰ The fact that in the sale of property the defendant made express warranties in addition to the fraudulent representations, does not require the plaintiff to seek his remedy on the warranties.⁷¹

10. Usurious loan.

Section 373 of the General Business Law expressly authorizes the court to cancel a usurious obligation. However clear the language of the statute may seem to be, it is held that the courts will not entertain an action in equity for the cancellation of the instrument, when the rights of the obligor can be adequately protected in an action at law on the obligation.⁷² Thus, in the absence of special circumstances appealing to equitable jurisdiction, the maker of a usurious note cannot maintain a suit in equity to rescind the note.⁷³ Courts of equity will, however, assume jurisdiction where the lender has possession of property pledged as security for the obligation.⁷⁴ So, too, an action may be maintained to cancel a usurious real estate mortgage, the cloud upon the mortgagor's title being sufficient to justify the affirmative action.⁷⁵

tled rule that wherever a matter respects only a sale of personal chattels, and lies merely in damages, the remedy is at law only. If this had been a sale of a horse to the plaintiff procured by fraud, it would not have been proper for her to resort to an equitable action for relief, because an action at law would furnish her an ample remedy, and give her all the relief to which she could, under any circumstances, be entitled." *Bosley v. National Machine Co.*, 123 N. Y. 550.

68. *Crane v. Bunnell*, 10 Paige 333.

69. *Bosley v. National Machine Co.*, 123 N. Y. 550. Compare, *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636. See, *infra*, II-A-12, Transfer of securities.

70. *Wolff v. Altman*, 196 App. Div. 549, 187 N. Y. Supp. 902.

71. *Heidenreich v. Doushkess*, 134 N.

Y. Supp. 472. Compare, *Mason v. Wheeler*, 2 Misc. 523, 24 N. Y. Supp. 879.

72. *Minturn v. Farmers' Loan & Trust Co.*, 3 N. Y. 498; *Allerton v. Belden*, 49 N. Y. 373; *Perrine v. Striker*, 7 Paige 598.

73. *Minturn v. Farmers' Loan & Trust Co.*, 3 N. Y. 498; *Allerton v. Belden*, 49 N. Y. 373; *Reiner v. Galinger*, 151 App. Div. 711, 136 N. Y. Supp. 205.

74. *Hager v. Arland*, 81 Misc. 421, 143 N. Y. Supp. 388; *Peters v. Mortimer*, 4 Edw. Ch. 279; *Dickson v. Valentine*, 25 Jones & S. (57 Super. Ct.) 128, 6 N. Y. Supp. 540, 24 St. Rep. 957.

75. *Myers v. Wheeler*, 24 App. Div. 327, 48 N. Y. Supp. 611, affirmed, 161 N. Y. 637; *Williams v. Ayrault*, 31 Barb. 364.

11. Receipt.

A receipt is merely evidence which may be used as a declaration against the party signing it. It is not a release of an obligation. Hence, an action is not maintainable to rescind a receipt, but the only remedy of a party, in case a receipt has been wrongfully procured, is to explain the receipt on the trial of his action on the obligation.⁷⁶

F. Restoration of benefits received by plaintiff.

1. In general.

It is the general rule, but like other general rules subject to some exceptions, that, as a condition to obtaining the equitable relief of rescission, the plaintiff must restore to the defendant such benefits as he has received by virtue of the instrument.⁷⁷ The courts apply the equitable maxim

76. *Rose v. McCaldin*, 195 N. Y. 210.

77. *Minturn v. Maine*, 7 N. Y. 220; *Hammond v. Pennock*, 61 N. Y. 145; *Town of Venice*, 62 N. Y. 462; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Graham v. Meyer*, 99 N. Y. 611; *Littlejohn v. Leffingwell*, 27 App. Div. 377, 62 N. Y. Supp. 79; *Gilgallon v. Bishop*, 46 App. Div. 350, 61 N. Y. Supp. 467; *Nelson v. Hatch*, 56 App. Div. 149, 67 N. Y. Supp. 570; *City of Ironwood v. Wickes*, 93 App. Div. 164, 87 N. Y. Supp. 554; *Mincho v. Bankers L. Ins. Co.*, 124 App. Div. 578, 109 N. Y. Supp. 179; *Guilfoyle v. Pierce*, 125 App. Div. 504, 109 N. Y. Supp. 924, affirmed without opinion, 196 N. Y. 499; *Ring v. Ring*, 127 App. Div. 411, 111 N. Y. Supp. 713, affirmed without opinion, 199 N. Y. 574; *Interstate Chemical Corp. v. Duke*, 176 App. Div. 684, 163 N. Y. Supp. 1035; *Lapidus v. Canno*, 180 App. Div. 13, 167 N. Y. Supp. 420; *Aronoff v. Levine*, 190 App. Div. 172, 179 N. Y. Supp. 247, affirmed, 232 N. Y. 529; *Grigsby v. Hubbard*, 217 App. Div. 337, 216 N. Y. Supp. 716; *Urdang v. Posner*, 220 App. Div. 609, 222 N. Y. Supp. 396; *Mason v. Wheeler*, 2 Misc. 523, 24 N. Y. Supp. 579; *Van Liew v. Johnson*, 4 Hun 415,

6 T. & C. 648; *Cohen v. Ellis*, 52 Hun 133, 5 N. Y. Supp. 133; *Weill v. Malone*, 91 Hun 261, 36 N. Y. Supp. 114, affirmed without opinion, 159 N. Y. 523.

Assignment of insurance policy.—In an action by a widow to recover the amount of a policy issued to her upon the life of her husband, which has, prior to his death, been assigned to the defendant upon his paying to her the sum of \$2,000, a court of equity will not decree the restitution of such policy to her and the cancellation of the assignment, without requiring her to restore the money so received by her. *Wilson v. Lawrence*, 8 Hun 593.

Contract fully performed.—Where a consumptive having, as the evidence tends to show, delusions respecting his ailment and its cause, but who is in other respects rational, executes an assignment of certain mortgages held by him in consideration of the assignee's agreement to furnish him with board, medical attendance and other necessities during his natural life, and to give him Christian burial after his death, the assignment will not, in the absence of evidence that it was procured by improper influence, be set

that "He who seeks equity, must do equity."⁷⁸ Of course, if nothing of value has passed to the plaintiff, there is nothing to return.⁷⁹

2. Retention of what plaintiff is entitled to in any event.

One prominent exception to the general rule requiring restoration by the plaintiff before allowing rescission is, that, if the plaintiff is entitled in any event to the benefits he has received, he is not required to return or offer to return such benefits.⁸⁰ That is to say, if, regardless of

aside after the assignee has performed her agreement, except upon a restoration to her of the consideration actually supplied to the assignor in good faith in performance of the contract. *Gilgallon v. Bishop*, 46 App. Div. 350, 61 N. Y. Supp. 467.

Release of partners.—Where, after the dissolution of a partnership, one partner sues to rescind his agreement releasing his copartners from all obligations arising out of the partnership on the ground that it was obtained by fraud, he must return or tender notes, or proceeds thereof, which he received for the balance of his claim in the partnership assets in consideration of his release. This, because he who seeks equity must do equity. But in such action he need not return or tender sums received "on account of (his) copartnership interest," including the good will, as part of the consideration for his agreement to the *dissolution*, as distinguished from his release. *Staiger v. Klitz*, 129 App. Div. 703, 114 N. Y. Supp. 486.

Securities exchanged.—A party who receives securities issued by a foreign corporation in violation of the laws of this state, and then sells them for money, can not maintain a suit in equity to annul the securities given by him in exchange, without returning those received by him, or the money realized on the sale. *Mumford v. American Ins. Co.*, 4 N. Y. 463.

In an action against a third party,

whose title depends upon a contract claimed by plaintiff to have been rescinded, defendant cannot set up a want of tender by plaintiff, to the other party to the contract, of a return of what plaintiff received. *Town of Springport v. Teutonia Sav. Bank*, 84 N. Y. 403.

78. *Callanan v. Keeseville, etc., R. Co.*, 199 N. Y. 268; *Pritz v. Jones*, 117 App. Div. 643, 102 N. Y. Supp. 549; *Mincho v. Bankers L. Ins. Co.*, 124 App. Div. 578, 109 N. Y. Supp. 179; *Staiger v. Klitz*, 129 App. Div. 703, 114 N. Y. Supp. 486.

79. *Tiffany v. Clark*, 58 N. Y. 632; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Nelson v. Hatch*, 56 App. Div. 149, 67 N. Y. Supp. 570; *Morgan Munitions Supply Co. v. Studebaker Corp.*, 180 App. Div. 530, 168 N. Y. Supp. 37.

80. *Kley v. Healy*, 127 N. Y. 555; *Littlejohn v. Leffingwell*, 47 App. Div. 377, 62 N. Y. Supp. 79; *Powell v. F. C. Linde Co.*, 49 App. Div. 286, 64 N. Y. Supp. 153; *Price v. Stout*, 84 App. Div. 334, 82 N. Y. Supp. 935; *Staiger v. Klitz*, 136 App. Div. 874, 122 N. Y. Supp. 107; *Gugel v. Hiscox*, 138 App. Div. 61, 122 N. Y. Supp. 557, reversed on other grounds, 216 N. Y. 145; *Morgan Munitions Supply Co. v. Studebaker Corp.*, 180 App. Div. 530, 168 N. Y. Supp. 37; *Metropolitan El. Ry. Co. v. Manhattan Ry. Co.*, 14 Abb. N. C. 103, 11 Daly, 373; *Spannocchia v. Loew*, 87 Hun 167, 33 N. Y. Supp.

how the litigation may terminate, he is entitled to that which he has already received, and the action represents a struggle for additional recovery, he need not make the idle ceremony of offering restoration. While the sum retained should be taken into account in the award of relief, an offer to restore it is not a condition precedent to the bringing of the action.⁸¹

This exception is especially applicable in actions to cancel releases procured by fraud.⁸² In such cases, all that the plaintiff is required to do is to offer to allow the defendant credit for the moneys received.⁸³ Thus, when it is sought to rescind a release of liability under an insurance policy, and to recover on the policy, the plaintiff need not return or offer to return the moneys he received on the execution of the release, for in any event he is entitled to that amount.⁸⁴ The same principle is applied when a woman seeks to set aside a release of dower.⁸⁵ Likewise, where a partner has by fraud been induced to accept a settlement of the partnership matters, in an action to set aside such settlement, he is not required to restore or offer to restore what he has received under the settlement, it being his contention that such sum is less than the sum to which he is actually entitled.⁸⁶ A settlement between joint adventurers is similarly considered.⁸⁷ Likewise, where one is induced by fraud to cancel an existing lease of premises and take a new lease, he need not surrender possession of the premises as a condition of relief, for in any event he is entitled to possession.⁸⁸

3. Restoration impossible.

When restoration by the plaintiff is impossible, a court of equity is in the difficult position of desiring to do equity, but

1050, 67 St. Rep. 736, affirmed on opinion below, 156 N. Y. 660.

81. *Kley v. Healy*, 127 N. Y. 555.

82. *Kley v. Healy*, 127 N. Y. 555; *Reynolds v. Westchester F. Ins. Co.*, 8 App. Div. 193, 40 N. Y. Supp. 336.

83. *Reynolds v. Westchester F. Ins. Co.*, 8 App. Div. 193, 40 N. Y. Supp. 336.

84. *Reynolds v. Westchester F. Ins. Co.*, 8 App. Div. 193, 40 N. Y. Supp. 336; *Jones v. Commercial Travelers'*

Mut. A. Assn., 114 N. Y. Supp. 589, affirmed, 134 App. Div. 936, 113 N. Y. Supp. 1116, modified 201 N. Y. 576.

85. *Spannocchia v. Loew*, 87 Hun 167, 33 N. Y. Supp. 1050, 67 St. Rep. 736, affirmed on opinion below, 156 N. Y. 660.

86. *Staiger v. Klitz*, 136 App. Div. 874, 122 N. Y. Supp. 107.

87. *Price v. Stout*, 84 App. Div. 334, 82 N. Y. Supp. 935.

88. *Powell v. F. C. Linde Co.*, 49 App. Div. 286, 64 N. Y. Supp. 153.

without practical means of accomplishing such result. The easy solution is to deny the relief and insist that the parties have their controversy determined in an action at law. Hence, the rule is sometimes stated that, if there can be no restoration, there can be no rescission.⁸⁹ In such a case, it does not aid the plaintiff to offer restoration.⁹⁰ A more satisfactory rule, however, and one which is supported by authority, is that, if the parties cannot be put back *in statu quo*, the relief will be granted only when the clearest and strongest equity imperatively demands it.⁹¹ The terms upon which rescission may be granted where complete restoration of the parties to their former position is impossible, rests in the sound discretion of the court.⁹²

In following the general rule, it has been held, where a mortgage was assigned on agreement of the assignee to permit a will to be probated with contest, the assignment of the mortgage would not be cancelled, after the probate of will, it being impossible to place the parties *in statu quo*.⁹³ Thus, where one received from a railway company shares of its stock as consideration for the grant of an easement, and it appeared that afterwards the stock was transferred on the books of the company at the request of the owner to infant children, he was not allowed to maintain an action for the rescission of the easement, as he could not restore the railway to its original position.⁹⁴ One who has received negotiable bonds will not be allowed to rescind the transaction unless he can surrender the bonds.⁹⁵

If it is the fraud of the defendant that has rendered restoration impossible, he cannot complain, and the rescission may be accomplished, the judgment in such a case doing equity so far as possible.⁹⁶ If the wrongdoer, by his

89. *Scheibe v. Zaro*, 199 App. Div. 807, 192 N. Y. Supp. 433; *Francis v. New York, etc., R. Co.*, 17 Abb. N. C. 1, affirmed, 108 N. Y. 93; *Bedell v. Bedell*, 3 Hun 580; *Duff v. Hutchinson*, 57 Hun 152, 10 N. Y. Supp. 857, 32 St. Rep. 949.

90. *Duff v. Hutchinson*, 57 Hun 152, 10 N. Y. Supp. 857, 32 St. Rep. 949.

91. *Abner M. Harper, v. Newburgh*, 159 App. Div. 695, 145 N. Y. Supp. 59.

92. *Buffalo Builders Supply Co. v. Reeb*, 247 N. Y. 170.

93. *Bedell v. Bedell*, 3 Hun 580.

94. *Francis v. New York, etc., Elev. R. Co.*, 108 N. Y. 93.

95. *City of Ironwood v. Wickes*, 93 App. Div. 164, 87 N. Y. Supp. 554.

96. *Butler v. Prentiss*, 158 N. Y. 49; *Ring v. Ring*, 55 Misc. 420, 105 N. Y. Supp. 498, affirmed, 127 App. Div. 411, 111 N. Y. Supp. 713, affirmed without opinion, 199 N. Y. 574; *Parton v. Metropolitan Life Ins. Co.*, 129 Misc. 493, 221 N. Y. Supp. 610; *Anthony v. Day*, 52 How. Pr. 35;

fraudulent acts, has so complicated the case that full restoration cannot be had, he has only himself to blame.⁹⁷ When, without fault on the part of the one seeking relief in equity on account of advantage taken of fiduciary relations, it is impossible to restore the one guilty of the fraud to his original condition, the general rule of restoration is not strictly applied, because it would become a loophole for the escape of fraud. Equity makes a reasonable application of the rule by requiring whatever fair dealing requires under all the circumstances of the particular case, but it does not permit the rule to become a shield for wrongdoing.⁹⁸

The rule that, if any party to the agreement has done what cannot be undone, or omitted what he might have done, rescission cannot be had, does not apply to things done or left undone by a party who had previous knowledge that the agreement was repudiated by the other party, or by those who have a right to contest its validity on his behalf.⁹⁹

Where a husband by duress compelled his wife before their marriage to deed her property to both of them as tenants by the entirety, the court will not refuse to cancel the deed because his marriage to her, for which the deed was part consideration, cannot be annulled in the action.¹

If the impossibility of restoration becomes apparent on

Myers v. King, 48 Hun 106, 15 St. Rep. 482.

97. Hammond v. Pennock, 61 N. Y. 145.

98. Butler v. Prentiss, 158 N. Y. 49.

99. Metropolitan El. Ry. Co. v. Manhattan Ry. Co., 14 Abb. N. C. 103, 11 Daly 373.

1. Ring v. Ring, 127 App. Div. 411, 111 N. Y. Supp. 713, affirmed without opinion, 199 N. Y. 574.

Marriage.—Where the execution and delivery of a deed of valuable real estate by a widow sixty-five years of age to her confidential agent and business man twenty-five years her junior, is procured by his fraud, coercion, threats and undue influence; and shortly thereafter the parties marry in pursuance of an agreement incorporated in the deed and stated therein to be a part of the consideration, but never co-

habit as husband and wife; and it appears that said marriage was simply a part of defendant's scheme to obtain grantor's property and that defendant's agreement to marry her and its subsequent consummation were all in furtherance of his fraudulent purpose, the grantor is entitled to have the deed adjudged to be fraudulent and void and canceled of record; and the court may require the defendant to account for the rents, issues and income of the property. The plaintiff is not prevented from maintaining the action by reason of her inability to restore the defendant to his former position which arises from his own acts in the prosecution of his fraudulent purpose. Ring v. Ring, 55 Misc. 420, 105 N. Y. Supp. 498, affirmed, 127 App. Div. 411, 111 N. Y. Supp. 713, affirmed without opinion, 199 N. Y. 574.

the trial, the court need not necessarily dismiss the action, but may retain jurisdiction for the purpose of allowing money damages in lieu of rescission.²

4. Incompetent persons.

A contract made by an incompetent after an adjudication of his incompetency is void; but one made before the adjudication is merely voidable. When a contract made before adjudication is fair and for the benefit of the incompetent, and the other party thereto has acted in good faith without notice of the incapacity, a rescission should not be allowed unless the other party can be placed *in statu quo*.³

5. Separation agreements.

A separation agreement between husband and wife will not be sustained, unless it is fair and makes adequate provision for the support of the wife. If she brings an action for its rescission, she will be compelled to restore to the husband the benefits she has received under the contract;⁴ but will not be compelled to return any part of the consideration which she has already expended for her support.⁵ And it has been thought that the complaint need not allege a restoration or offer of restoration, but that the matter can be adjusted by the judgment.⁶

6. Usurious obligations.

In an action to rescind a transaction on the ground of usury, section 377 of the General Business Law limits the usual practice of courts of equity in the granting of restoration. Prior to the first enactment of this statute in 1837, it was held that equity would not decree the cancellation of an obligation on the ground of usury, without repayment

2. *Baker v. Ziegler*, 56 Hun 405, 10 N. Y. Supp. 249, 31 St. Rep. 466. And see, *infra*, III-G, Relief granted.

3. *McCarthy v. Bowling Green Storage & Van Co.*, 132 App. Div. 18, 169 N. Y. Supp. 463. See also, *Riggs v. American Tract Soc.*, 84 N. Y. 330.

4. *Hungerford v. Hungerford*, 161 N. Y. 550; *Lake v. Lake*, 136 App. Div. 47, 119 N. Y. Supp. 686; *Hogg v.*

Lindridge, 151 App. Div. 513, 135 N. Y. Supp. 928; *Montgomery v. Montgomery*, 170 N. Y. Supp. 867.

5. *Hungerford v. Hungerford*, 161 N. Y. 550; *Glusker v. Glusker*, 108 Misc. 287, 177 N. Y. Supp. 582; *Montgomery v. Montgomery*, 170 N. Y. Supp. 867.

6. *Pelz v. Pelz*, 156 App. Div. 765, 142 N. Y. Supp. 54.

of the loan.⁷ The statutory provision, however, permits a "borrower" to maintain the action and to have the obligation cancelled without a repayment or offer of repayment.⁸ But in many cases the courts have been able to carry out the original conception of equity by giving a restricted meaning to the term "borrower."⁹ Only the person originally securing the loan is considered a "borrower," and others such as a grantee of the real or personal property which is security for the loan,¹⁰ a subsequent lienor,¹¹ a trustee in bankruptcy,¹² an assignee for creditors,¹³ a heir or devisee,¹⁴ a personal representative,¹⁵ a husband or wife,¹⁶ or a surety of the obligation,¹⁷ are not so privileged, and must make restoration as a condition for affirmative relief against the usurious obligation. This does not restrict their right to interpose the defense of usury, the distinction between an attack and a defense being maintained.

7. Offer of restoration in complaint.

In an action at law for the recovery of the consideration which one has surrendered under a contract which is void or voidable, it is a necessary prerequisite that the plaintiff have restored or offered to restore the benefits he has received under the contract.¹⁸ The rule in an equitable

7. *Marsh v. House*, 13 Hun 126; *Fanning v. Dunham*, 5 Johns. Ch. 122; *Dunham v. Dey*, 15 Johns. 555.

8. *Bissel v. Kellogg*, 60 Barb. 617, affirmed, 65 N. Y. 432; *O'Brien v. Ferguson*, 37 Hun, 368.

9. *Buckingham v. Corning*, 91 N. Y. 525.

10. *Bissell v. Kellogg*, 65 N. Y. 432; *Bissell v. Kellogg*, 60 Barb. 617, affirmed, 65 N. Y. 432; *Beecher v. Ackerman*, 1 Abb. Pr. (N. S.) 141; *O'Brien v. Ferguson*, 37 Hun 368; *Dickson v. Valentine*, 25 Jones & S. (57 Super. Ct.) 128, 6 N. Y. Supp. 540, 24 St. Rep. 957.

11. *Rexford v. Widger*, 2 N. Y. 131; *Yormark v. Waldman*, 127 Misc. 748, 217 N. Y. Supp. 501.

12. *Wheelock v. Lee*, 64 N. Y. 242.

13. *Wright v. Clapp*, 28 Hun 7.

Repurchase by borrower.—Where

the borrower incumbered his property to secure the payment of an usurious debt, and was afterwards discharged from his debts under the bankrupt act, and subsequently re-acquired title to the property by a purchase from the assignee in bankruptcy; on a bill filed by him to have the incumbrance canceled on account of the usury; Held, that he was not entitled to relief without paying the amount actually loaned and interest. *Schermerhorn v. Talman*, 14 N. Y. 93.

14. *Buckingham v. Corning*, 91 N. Y. 525; *Marsh v. House*, 13 Hun 126.

15. *Buckingham v. Corning*, 91 N. Y. 525.

16. *Alden v. Diossy*, 16 Hun 311; *Smith v. Cross*, 16 Hun 487.

17. *Alden v. Diossy*, 16 Hun 311.

18. *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Price v. Stout*, 84

action of rescission, however, is different. The action at law is based on theory that a rescission of the contract has been accomplished, while the equity action seeks a rescission.¹⁹ In the equitable action it is declared as a general rule that no restoration or tender of restoration is required before the commencement of the action, but that it is sufficient if the plaintiff alleges in his complaint his willingness to surrender the benefits he has received, and upon the trial makes a tender thereof to the defendant.²⁰ The court can thereupon proceed to judgment and make the relief conditioned upon restoration or make such allowances to the defendant as the circumstances of the case may equitably demand.²¹

There has, however, from time to time been some confusion on this question. Thus, there can be found decisions which apparently take the view that the plaintiff must tender restoration before the commencement of the action.²² At the other extreme, there are decisions which indicate that

App. Div. 334, 82 N. Y. Supp. 935; McGowan v. Blake, 134 App. Div. 165, 118 N. Y. Supp. 905; Dusenbury v. Lehmner, 46 How. Pr. 417.

19. McGowan v. Blake, 134 App. Div. 165, 118 N. Y. Supp. 905.

20. Gould v. Cayuga County Nat. Bank, 86 N. Y. 75; Vail v. Reynolds, 118 N. Y. 297; Berry v. American Central Ins. Co., 132 N. Y. 49; Callanan v. Keeseville, etc., R. Co., 199 N. Y. 268; Halpin v. Mutual Brewing Co., 20 App. Div. 583, 47 N. Y. Supp. 412; Littlejohn v. Leffingwell, 40 App. Div. 13, 57 N. Y. Supp. 839; Littlejohn v. Leffingwell, 47 App. Div. 377, 62 N. Y. Supp. 79; Chisholm v. Eisenhuth, 69 App. Div. 134, 74 N. Y. Supp. 496; Price v. Stout, 84 App. Div. 334, 82 N. Y. Supp. 935; Mincho v. Bankers' L. Ins. Co., 124 App. Div. 578, 109 N. Y. Supp. 179; Cox v. Stillman, 132 App. Div. 433, 116 N. Y. Supp. 931; McGowan v. Blake, 134 App. Div. 165, 118 N. Y. Supp. 905; McNaught v. Equitable Life, etc., Soc., 136 App. Div. 774, 121 N. Y. Supp. 447; Sherwood v. Fincke, 196 App. Div. 97, 187 N. Y. Supp. 755; Smith v. Howlett, 21 Misc.

386, 47 N. Y. Supp. 1002; Merry Realty Co. v. Martin, 103 Misc. 9, 169 N. Y. Supp. 696; Dusenbury v. Lehmner, 46 How. Pr. 417; Dickson v. Valentine, 25 Jones & S. (57 Super. Ct.) 128, 6 N. Y. Supp. 540, 24 St. Rep. 957.

Certificates of stock.—In an action to rescind a purchase of stock, it is sufficient if the plaintiff, in his complaint, offers to return the stock, and he procures it upon the trial and tenders a surrender thereof; and the decree requires the stock to be deposited with the clerk of the court for the benefit of the defendant. Chisholm v. Eisenhuth, 69 App. Div. 134, 74 N. Y. Supp. 496.

21. Gould v. Cayuga County Nat. Bank, 86 N. Y. 75; Berry v. American Central Ins. Co., 132 N. Y. 49; Littlejohn v. Leffingwell, 47 App. Div. 377, 62 N. Y. Supp. 79; Davis v. Gifford, 182 App. Div. 99, 169 N. Y. Supp. 492; Smith v. Howlett, 21 Misc. 386, 47 N. Y. Supp. 1002; Dusenbury v. Lehmner, 46 How. Pr. 417.

22. Dennis v. Powers, 96 Misc. 252, 160 N. Y. Supp. 636.

it is not necessary to allege in the complaint a willingness to make restoration, but that, even in the absence of such an allegation, the court has jurisdiction and can provide restoration in the decree.²³ This is true where restoration is not required, as for example, where the plaintiff is entitled in any event to what he has received.²⁴

8. Extent of restoration.

There can be no partial rescission of a contract.²⁵ The plaintiff cannot make a partial restoration and seek a partial cancellation of the instrument.²⁶ He who would rescind must rescind wholly, and leave no right flowing from him outstanding which imperils the completeness of the rescission.²⁷

Where the rescission of a contract is sought on the ground of fraud, there are, as has been shown in the foregoing paragraphs, some instances where full restoration is not required. Where relief is sought on that ground, ordinarily the plaintiff will be required to restore only what he has received or has by force of the contract under his control.²⁸ And where the plaintiff has incurred expenses or sustained damage by reason of the fraud, equity will not compel him to pay back all that he has received, but only such part as remains after deducting his loss. The party perpetrating the fraud may be compelled to pay whatever damage the other party has sustained by reason of the fraud.²⁹

G. Election of remedies.

1. Remedies available.

One induced by fraud to enter into a contract has an election of three remedies. (1) He may rescind the contract

²³ Allerton v. Allerton, 50 N. Y. 670; Halpin v. Mutual Brewing Co., 20 App. Div. 583, 47 N. Y. Supp. 412; Keefuss v. Weilmunster, 89 App. Div. 306, 85 N. Y. Supp. 913; Pritz v. Jones, 117 App. Div. 643, 102 N. Y. Supp. 549; Cawthra v. Stewart, 59 Misc. 38, 109 N. Y. Supp. 770; Beecher v. Ackerman, 1 Abb. Pr. (N. S.) 141; Hay v. Hay, 13 Hun 315.

²⁴ Price v. Stout, 84 App. Div. 334, 82 N. Y. Supp. 935.

²⁵ See, supra, I-D, Partial rescission.

²⁶ Maas v. Rosenthal, 125 App. Div. 452, 109 N. Y. Supp. 917; Friedman v. Richman, 213 App. Div. 467, 210 N. Y. Supp. 648, affirmed, 241 N. Y. 576; Myers v. King, 48 Hun 106, 15 St. Rep. 482.

²⁷ Francis v. New York, etc., Elev. R. Co., 108 N. Y. 93.

²⁸ Hammond v. Pennock, 61 N. Y. 145.

²⁹ Mincho v. Bankers' L. Ins. Co., 124 App. Div. 573, 109 N. Y. Supp. 179.

by returning or offering to return what he has received by virtue thereof, and may then maintain an action at law to recover what he has parted with. (2) He may retain what he has received under the contract and sue at law for the damages he has sustained by reason of the fraud. (3) He may maintain the equitable action of rescission.³⁰ The last named remedy is the one discussed in this chapter. These remedies are available to one acting on the offensive. He also may have relief when on the defensive. Thus, when sued on the contract, he may set up a counterclaim for damages sustained by the fraud, or he may seek the rescission as an equitable counterclaim, or, if he has restored or offered to restore what he has received on the contract, he may set up as a defense the fraud and the rescission.³¹

30. *Hammond v. Pennock*, 61 N. Y. 145; *Schiffer v. Dietz*, 83 N. Y. 300; *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75; *Vail v. Reynolds*, 118 N. Y. 297; *Yeomans v. Bell*, 151 N. Y. 230; *Heckscher v. Edenborn*, 203 N. Y. 210; *Merry Realty Co. v. Shamokin, etc., Co.*, 230 N. Y. 316; *Weigel v. Cook*, 237 N. Y. 136; *Barber v. Kendall*, 1 App. Div. 247, 37 N. Y. Supp. 141, 72 St. Rep. 623, affirmed, 158 N. Y. 401; *Mincho v. Bankers' L. Ins. Co.*, 124 App. Div. 578, 109 N. Y. Supp. 179; *McNaught v. Equitable Life, etc., Soc.*, 136 App. Div. 774, 121 N. Y. Supp. 447; *Hedges v. Pioneer Iron Works*, 166 App. Div. 208, 151 N. Y. Supp. 495; *Davis v. Gifford*, 192 App. Div. 99; 169 N. Y. Supp. 492; *Wood v. Dudley*, 188 App. Div. 136, 176 N. Y. Supp. 494; *Kaston v. Zimmerman*, 192 App. Div. 511, 183 N. Y. Supp. 615; *Goins v. Atwood*, 204 App. Div. 439, 197 N. Y. Supp. 781; *Trowbridge v. Oehmsen*, 207 App. Div. 740, 202 N. Y. Supp. 833, affirmed, 241 N. Y. 264; *Wood v. Hill*, 214 App. Div. 417, 212 N. Y. Supp. 550; *Wright v. Deniston*, 9 Misc. 79, 29 N. Y. Supp. 718, 59 St. Rep. 549; *LaFollette v. Noble*, 13 Misc. 574, 34 N. Y. Supp. 955; *Metropolitan El. Ry. Co. v. Manhattan Ry. Co.*, 14 Abb. N. C. 103, 11 Daly 373; *Brad-*

ley v. Bosley, 1 Barb. Ch. 125; *Van Liew v. Johnson*, 4 Hun 415, 6 T. & C. 648; *Rose v. Merchants' Trust Co.*, 96 N. Y. Supp. 946.

Fraudulent release of dower.—Where the release of her inchoate right of dower has been fraudulently obtained from a married woman and a certain sum has been paid her in consideration therefor; she has three remedies. She may sue for the deceit, admitting that she has received such sum and kept it, stating that the right she parted with was worth much more, and upon proof thereof she can recover whatever amount of damages the evidence shows would make her as well off as if she had not been defrauded, or she may sue in equity to rescind, offering in her complaint to repay such sum and tendering it on the trial, or she may bring her action at law for an admeasurement of dower, in which case she must pay back or tender the amount received upon the trial thereof. *Spannocchia v. Loew*, 87 Hun 167, 33 N. Y. Supp. 1050, 67 St. Rep. 736, affirmed on opinion below, 156 N. Y. 660.

31. *Barber v. Kendall*, 1 App. Div. 247, 37 N. Y. Supp. 141, 72 St. Rep. 623, affirmed, 158 N. Y. 401; *Sparer v. Travelers' Ins. Co.*, 185 App. Div.

2. What constitutes an election.

One who has by reason of fraud been induced to enter into a contract must, if he desires to rescind the transaction, promptly take action; if he fails to do so, he waives his right to rescission.³² Ordinarily, the commencement of an action to rescind a contract constitutes an election of remedies which will preclude a subsequent action on the contract,³³ or a subsequent action for damages for the same fraud.³⁴ Likewise, if one, with full knowledge of the situation, commences an action at law, he will not thereafter be allowed to seek equitable relief.³⁵

On the other hand, the fact that after the commencement of an action in this State for a rescission, the plaintiff commenced an action in another State for the recovery of the consideration paid, does not necessarily constitute a waiver of the action in this State.³⁶

3. Effect of election.

An election to pursue one form of remedy will generally have the effect of depriving a party from a resort to one of the other forms of redress.³⁷ One cannot seek inconsistent remedies at the same time, and having made an election, he will be required to adhere to it.³⁸ The election of

861, 173 N. Y. Supp. 673; Wood v. Dudley, 188 App. Div. 136, 176 N. Y. Supp. 494.

32. See, *supra*, I-H-3, Delay in asserting claim.

33. American Woolen Co. v. Samuelsohn, 226 N. Y. 61.

34. Merry Realty Co. v. Shamokin, etc., Co., 230 N. Y. 316; Clark v. Kirby, 243 N. Y. 295; Maass v. Rosenthal, 125 App. Div. 452, 109 N. Y. Supp. 917.

35. Levan v. American Safety Table Co., Inc., 222 App. Div. 110, 224 N. Y. Supp. 841; Lloyd v. Brewster, 4 Paige 537. See also, Turner Lumber Co. v. Lacey, 201 App. Div. 41, 193 N. Y. Supp. 656; Keep v. Pacific Devel. Co., 118 Misc. 779, 194 N. Y. Supp. 605.

36. Clark v. Kirby, 243 N. Y. 295. See also, Clark v. Kirby, 204 App. Div. 447, 198 N. Y. Supp. 172.

37. American Woolen Co. v. Samuelsohn, 226 N. Y. 61; Merry Realty Co. v. Shamokin, etc., Co., 230 N. Y. 316; Clark v. Kirby, 243 N. Y. 295.

Specific performance.—A judgment rendered at the suit of the purchaser and complied with and satisfied by the vendor, decreeing specific performance of the unperformed portion of an otherwise executed contract for the conveyance of land, such as the removal of an incumbrance, where the vendor, although he did not appear at the trial, had answered, setting up fraud on the part of the purchaser, constitutes a conclusive defense to a subsequent action by the vendor against the purchaser to rescind and set aside the contract on the ground of fraud in its inception. Barber v. Kendall, 158 N. Y. 401.

38. Schiffer v. Dietz, 83 N. Y. 300;

remedies is largely a rule of policy to prevent vexatious litigation, and like the Statute of Frauds is somewhat arbitrary.⁹³ While it is the rule that one who has elected to sue in rescission instead of damages must pursue the course he has taken, yet if the remedy chosen is insufficient or inadequate or useless, the plaintiff is not barred from taking other timely methods to obtain his rights.⁴⁰ And, while the election to rescind may become irrevocable if the other party accepts the rescission, yet if the right to rescind is disputed there may be subsequent affirmance if the other party is willing.⁴¹ Moreover, a court of equity may, in a proper case, relieve a plaintiff from an error in procedure.⁴²

H. Waiver, ratification, acquiescence, estoppel.

1. In general.

A contract procured by fraud is not void; it is merely voidable at the option of the one defrauded.⁴³ After the discovery of the fraud which has been perpetrated, one may nevertheless affirm the transaction. Should he, with full knowledge of the situation, ratify the contract, he is deemed to have waived his right to a rescission.⁴⁴ A ratification of the contract may arise from a delay in seeking redress,⁴⁵

Yeomans v. Bell, 151 N. Y. 230; *Goins v. Atwood*, 204 App. Div. 439, 197 N. Y. Supp. 781; *Ufland & Co. v. McMahon*, 215 App. Div. 267, 213 N. Y. Supp. 519; *Rose v. Merchants' Trust Co.*, 96 N. Y. Supp. 946.

39. *Clark v. Kirby*, 243 N. Y. 295.

40. *Clark v. Kirby*, 243 N. Y. 295; *Schenck v. State Line Telep. Co.*, 207 App. Div. 545, 200 N. Y. Supp. 772, affirmed, 238 N. Y. 308; *Urdang v. Posner*, 220 App. Div. 609, 222 N. Y. Supp. 396. The situation announced in the text must be carefully distinguished from a case where a plaintiff has ratified or waived the fraud, and not merely made an erroneous election of remedies. See *Schenck v. State Line Telep. Co.*, 238 N. Y. 308. And see, *infra*, I-H, waiver, ratification, acquiescence, estoppel.

41. *McNaught v. Equitable Life, etc., Soc.*, 136 App. Div. 774, 121 N. Y. Supp. 447.

42. *Clark v. Kirby*, 243 N. Y. 295.

43. *Covv v. Hatfield*, 46 N. Y. 533; *Barber v. Kendall*, 1 App. Div. 247, 37 N. Y. Supp. 141, 72 St. Rep. 623, affirmed, 158 N. Y. 401; *Davis v. Gifford*, 182 App. Div. 99, 169 N. Y. Supp. 492; *Myers v. King*, 48 Hun 106, 15 St. Rep. 482.

44. *Schenck v. State Line Telep. Co.*, 238 N. Y. 308; *Clark v. Kirby*, 243 N. Y. 295; *McNaught v. Equitable Life, etc., Soc.*, 136 App. Div. 774, 121 N. Y. Supp. 447; *Davis v. Gifford*, 182 App. Div. 99, 169 N. Y. Supp. 492; *Shiverick v. Bonsall*, 185 App. Div. 338, 173 N. Y. Supp. 90; *Dennin v. Woodbury*, 96 Misc. 247, 160 N. Y. Supp. 647; *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636; *Treacy v. Hecker*, 51 How. Pr. 69; *Myers v. King*, 48 Hun 106, 15 St. Rep. 482.

45. See, *infra*, I-H-3, Delay in asserting claim.

or from the retention of benefits under the contract,⁴⁶ or from some affirmative act which evinces an intention to acquiesce in its provisions. If he recognizes the validity of the contract by acting on it after a discovery of the fraud, he cannot have a rescission.⁴⁷ These principles apply to municipalities as well as to individuals.⁴⁸

The question of waiver is largely one of intent.⁴⁹ If the facts are consistent with some theory other than waiver, the waiver should not be found as a matter of law. It is a question of fact.⁵⁰ The question of affirmance depends upon the circumstances.⁵¹ Thus, in an action to set aside a forged satisfaction of a mortgage made by an attorney who received the payments, the fact that the mortgagee presented his claim against the estate of the attorney, is not a bar to recovery.⁵²

2. Knowledge essential.

In order that the conduct or acquiescence of a party constitute a ratification of the contract, it is essential that he have knowledge of the fraud or infirmity in the contract.⁵³ In the absence of knowledge of the situation, there will be no ratification or affirmance of the transaction.⁵⁴ An act, to constitute a waiver, must be performed with full knowledge of the circumstances with respect to which the waiver is to be operative.⁵⁵ Mere want of diligence in discovering the fraud does not deprive one of his remedy in equity. The

46. See, *infra*, II-H-5, Retention of benefits from contract.

47. *Treacy v. Hecker*, 51 How. Pr. 69; *Myers v. King*, 48 Hun 106, 15 St. Rep. 482; *Rose v. Merchants' Trust Co.*, 96 N. Y. Supp. 946.

48. *Baird v. City of New York*, 96 N. Y. 567.

49. *Clark v. Kirby*, 243 N. Y. 295. "Waiver and abandonment, however, are always questions of intent unless they merge into an estoppel, which may sometimes operate contrary to intent." *Clark v. Kirby*, 243 N. Y. 295.

50. *Clark v. Kirby*, 243 N. Y. 295; *Smith v. Howlett*, 21 Misc. 386, 47 N. Y. Supp. 1002.

51. *Myers v. King*, 48 Hun 106;

Rose v. Merchants' Trust Co., 96 N. Y. Supp. 946.

52. *Johnstone v. Burhans*, 68 Misc. 484, 124 N. Y. Supp. 465, affirmed, 146 App. Div. 951, 131 N. Y. Supp. 1121.

53. *Wright v. Deniston*, 9 Misc. 79, 29 N. Y. Supp. 718, 59 St. Rep. 549; *Norwegian-American Securities Corp. v. Schenstrom*, 124 Misc. 235, 207 N. Y. Supp. 163; *Myers v. King*, 48 Hun 106, 15 St. Rep. 482.

Pleading knowledge.—It has been held that the plaintiff should allege in his complaint the time when he discovered the fraud. *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636.

54. *Wager v. Reid*, 3 T. & C. 332.

55. *Wright v. Deniston*, 9 Misc. 79, 29 N. Y. Supp. 718, 59 St. Rep. 549.

innocent party does not owe the guilty party any duty of active diligence, and if he acts promptly after the actual discovery of the fraud, equity may grant the rescission.⁵⁶ He is not required to suspect and seek for fraud. Nor is suspicion to take the place of knowledge.⁵⁷

The knowledge of agent is not imputed to his principal when the former engages in transactions for his own benefit or for the benefit of a third person whose interests are hostile to the principal.⁵⁸ Before a principal can be held to have ratified the unauthorized act of an assumed agent he must have full knowledge of the facts; proof of partial or imperfect knowledge is not sufficient. Before a municipal corporation can be so held the facts constituting the ratification must be fully and clearly proved, so that it can fairly be said there was an intention to ratify the unauthorized act and receive the fruits thereof.⁵⁹

3. Delay in asserting claim.

The right to rescind a contract for fraud must be exercised promptly upon discovery of the situation, and any substantial delay in doing so will be deemed an election to affirm the contract.⁶⁰ Where a party upon discovering fraud in a contract lies by and speculates as to which is the better policy to pursue—to disaffirm or to allow the contract to stand—he cannot be permitted, after the course of events

56. *Baker v. Lever*, 67 N. Y. 304; *Merry Realty Co. v. Martin*, 103 Misc. 9, 169 N. Y. Supp. 696.

57. *Myers v. King*, 48 Hun 106, 15 St. Rep. 482.

58. *Norwegian-American Securities Corp. v. Schenstrom*, 124 Misc. 235, 207 N. Y. Supp. 163.

59. *Trustees of Easthampton v. Bowman*, 136 N. Y. 521.

60. *Cobb v. Hatfield*, 46 N. Y. 533; *Schiffer v. Dietz*, 93 N. Y. 300; *Baird v. City of New York*, 96 N. Y. 567; *Boyer v. East*, 161 N. Y. 580; *Hallahan v. Webber*, 7 App. Div. 122, 40 N. Y. Supp. 103; *Shiverick v. Bonsall*, 185 App. Div. 338, 173 N. Y. Supp. 90; *Davis v. Levering*, 168 App. Div. 78, 153 N. Y. Supp. 772; *Interstate Chemical Corp. v. Duke*, 176 App. Div.

684, 163 N. Y. Supp. 1035; *Fowler v. Fowler*, 197 App. Div. 572, 188 N. Y. Supp. 529; *Trowbridge v. Oehmsen*, 207 App. Div. 740, 202 N. Y. Supp. 833, affirmed, 241 N. Y. 264; *Friedman v. Richman*, 213 App. Div. 467, 210 N. Y. Supp. 648, affirmed, 241 N. Y. 576; *Grigsby v. Hubbard*, 217 App. Div. 357, 216 N. Y. Supp. 716; *LaFollette v. Noble*, 13 Misc. 574, 34 N. Y. Supp. 955; *Clarke v. Borough Asphalt Co.*, 93 Misc. 662, 157 N. Y. Supp. 581; *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636; *Merry Realty Co. v. Martin*, 103 Misc. 9, 169 N. Y. Supp. 696; *Castiglia v. Lucas*, 132 Misc. 480, 230 N. Y. Supp. 116; *Corwithe v. Griffing*, 21 Barb. 9; *Lawrence v. Dale*, 3 Johns. Ch. 23; *Rose v. Merchants' Trust Co.*, 96 N. Y. Supp. 946.

has demonstrated that disaffirmance is the better policy, to rescind. Equity requires that he should elect promptly and not delay action and permit the other party to treat the contract as existing and act accordingly.⁶¹ Just how long a party may delay without being deemed to have ratified the contract, will depend upon the circumstances of each particular case.⁶² Whether he has acted within a reasonable time must be gathered from all of the circumstances as they may be developed upon the trial.⁶³

4. Laches.

The laches of the plaintiff may bar equitable relief. The defense of laches is to be distinguished from the Statute of Limitations.⁶⁴ It is also to be distinguished from the question of waiver. A waiver of the right of rescission may arise from a delay in the assertion of the claim, from which delay an inference is drawn that the plaintiff has acquiesced in the fraud and elected to resort merely to damages for relief. The question of laches may, however, arise when the plaintiff has undisputably elected to rescind, but delays prosecution of his remedy so long that equity refuses relief on account of the staleness of the demand. In its discretion the court may refuse the equitable relief on the ground of laches.⁶⁵ Whether one has been guilty of laches necessarily

61. *Hallahan v. Webber*, 7 App. Div. 122, 40 N. Y. Supp. 103.

62. *Myers v. King*, 48 Hun 106, 15 St. Rep. 482.

Three months delay.—In April, 1894, a party to a contract learned that a fraud had been perpetrated upon her the preceding January in the making of the contract. She, however, permitted an assignee for the benefit of the creditors of the other contracting party, who was endeavoring to sell the assigned property, which included property transferred by her under the fraudulent contract, to sell the same. In June, on inquiring as to the prospects of obtaining a dividend under the assignment, she discovered that she could secure more money by a disaffirmance of the contract, and, on the tenth day of July, she attempted to

rescind it. *Held*, that because of her laches in seeking it she was not entitled to the relief asked for. *Hallahan v. Webber*, 7 App. Div. 122, 40 N. Y. Supp. 103.

"A delay of four or five years after the discovery of the alleged fraud is so unreasonable a time as to preclude the plaintiff from recovering even if the action be treated as one in equity." *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636.

63. *Schenck v. State Line Telep. Co.*, 238 N. Y. 303.

64. See, *infra*, III-A, Statute of Limitations.

65. *Calhoun v. Millard*, 121 N. Y. 69; *Town of Cherry Creek v. Becker*, 123 N. Y. 161; *Norman v. Federal Mining & Smelting Co.*, 180 App. Div. 325, 167 N. Y. Supp. 794; *Dennin v.*

depends upon the circumstances of the case.⁶⁶ If the delay is caused by the misrepresentations of the defendant, the plaintiff will not be charged with laches.⁶⁷ The possibility that the granting of relief may cause injury to third persons or that restoration may be impracticable, is an important circumstance.⁶⁸

It is especially where, by reason of neglect or delay, rights have been acquired which it would be unjust to disturb, that a court of equity refuses to give its aid in favor of an equitable claim when a less period than the corresponding one fixed by the Statute of Limitations has elapsed. The objection of laches will not be readily listened to where there has been no material change in the situation of the defendant or in the subject-matter of the action caused by or growing out of plaintiff's delay. Laches cannot be said to exist where a party is ignorant of his rights, or where, though apprehensive of them, there is such an obscurity in the transactions that he must, with painstaking, gather the facts or the evidence of them upon which the successful prosecution of the action must depend.⁶⁹

5. Retention of benefits from contract.

One, who after discovery of the fraud perpetrated upon him, voluntarily accepts the benefit of the contract is deemed to have ratified the contract and to have waived his right to a rescission.⁷⁰ If, with knowledge of the fraud, he in

Powers, 96 Misc. 252, 160 N. Y. Supp. 636.

66. *Boyer v. East*, 161 N. Y. 580; *Wood v. Hill*, 214 App. Div. 417, 212 N. Y. Supp. 550.

67. *Yedlin v. Rubin*, 219 App. Div. 694, 220 N. Y. Supp. 545.

68. *Calhoun v. Millard*, 121 N. Y. 69; *Parfitt v. Kings Co. Gas Co.*, 12 Misc. 278, 33 N. Y. Supp. 1111, 67 St. Rep. 814.

69. *Platt v. Platt*, 58 N. Y. 646. "In ordinary cases of tort and breach of contract, it is a fair and just rule which requires the injured party to use ordinary diligence to make his damages as small as he can, and confines his recovery to so much damages only as he could not by good faith

and ordinary diligence have averted. Much more where a party comes into equity seeking relief on the ground of mistake should he show that he has used due diligence and good faith to avert the consequences of the mistake; and it would be a poor administration of equity that would give him relief after, by his delay and omission of duty, he had caused irreparable mischief to the other party." *Thomas v. Bartow*, 48 N. Y. 193.

70. *Cobb v. Hatfield*, 46 N. Y. 533; *Brennan v. Nat. Equitable Ins. Co.*, 247 N. Y. 486; *Barber v. Kendall*, 1 App. Div. 247, 37 N. Y. Supp. 141, 72 St. Rep. 623, affirmed, 158 N. Y. 401; *McNaught v. Equitable Life, etc., Soc.*, 136 App. Div. 774, 121 N. Y. Supp.

any measure carries out the contract or receives a benefit under it, his election is made and his right to rescind is gone.⁷¹ If one retains the benefits of the contract, his sole remedy is for damages.⁷² Thus, one who has purchased corporate stock through fraudulent statements, cannot rescind the transaction, if, after the discovery of the fraud, he seeks the benefits accruing to stockholders.⁷³

6. Retaining possession of property.

The fact that one has retained the property which he has received under the contract he claims should be rescinded, is a circumstance to be considered on the question of whether he has affirmed the transaction.⁷⁴ He is not required to make restoration before the commencement of the action, an offer of restoration in the complaint being sufficient.⁷⁵ On the other hand a retention of the property for any considerable period after a discovery of the fraud may be considered a ratification of the contract.⁷⁶ Moreover, if his opponent disputes the right of rescission, he is not necessarily required to rely upon the uncertainty of litigation, and in such a case he may be justified, if not required by equitable principles, in exercising due care for the preservation of the property.⁷⁷ Hence, it is important to ascertain whether he has retained the property under the contract, or whether he has retained it as a bailee for his opponent with the intention of restoring it pursuant to the judgment in the case. If he has retained it and treated it as his own property, he is not entitled to a rescission in equity.⁷⁸ This is especially true, where he has

447; *Interstate Chemical Corp. v. Duke*, 176 App. Div. 684, 163 N. Y. Supp. 1035; *Clarke v. Borough Asphalt Co.*, 93 Misc. 662, 157 N. Y. Supp. 581; *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636. See also, *Norwegian-American Securities Corp. v. Schenstrom*, 124 Misc. 235, 207 N. Y. Supp. 163.

71. *Barker v. Kendall*, 1 App. Div. 247, 37 N. Y. Supp. 141, 72 St. Rep. 623, affirmed, 158 N. Y. 401.

72. *Davis v. Gifford*, 182 App. Div. 99, 169 N. Y. Supp. 492.

73. *Brennan v. Nat. Equitable Ins. Co.*, 247 N. Y. 486; *Davis v. Levering*, 168 App. Div. 78, 153 N. Y. Supp. 772;

Davis v. Gifford, 182 App. Div. 99, 169 N. Y. Supp. 492.

74. *Schiffer v. Dietz*, 83 N. Y. 300; *Barr v. New York, etc., R. Co.*, 125 N. Y. 263; *Weigel v. Cook*, 237 N. Y. 136.

75. See, *supra*, I-F-7, Offer of restoration in complaint.

76. See, *supra*, I-H-3, Delay in asserting claim.

77. *Davis v. Gifford*, 182 App. Div. 99, 169 N. Y. Supp. 492.

78. *Cobb v. Hatfield*, 46 N. Y. 533; *Schiffer v. Dietz*, 83 N. Y. 300; *Baird v. City of New York*, 96 N. Y. 567; *Interstate Chemical Corp. v. Duke*, 176 App. Div. 684, 163 N. Y. Supp. 1035;

altered the property or exchanged it for other property.⁷⁹

The fact that the property involved consists of real estate does not necessarily change the rule. Although there are some expressions in the opinions indicating that one seeking to rescind a purchase of real estate must surrender possession before commencing the action,⁸⁰ yet, if the rescission is disputed, the plaintiff may continue in possession of the premises as a trustee of the defendant.⁸¹ The retention of the possession is but evidence of an intent to abide by the contract,⁸² the question of repudiation or acquiescence being one to be determined on a consideration of all of the circumstances.⁸³ If the plaintiff has timely and definitely announced his intention to rescind and has commenced an action for that purpose, his subsequent possession of the premises will not necessarily bar the remedy.⁸⁴ On the other hand, the retention of the possession for any considerable period after a discovery of the situation and before seeking relief, evinces an intention to affirm the contract.⁸⁵ While holding the property as trustee pending the action, he is justified in handling the same in such a manner as to preserve as far as possible the full value of the premises.⁸⁶

Davis v. Gifford, 132 App. Div. 99, 169 N. Y. Supp. 492; *Wurlitzer v. Pappas*, 215 App. Div. 23, 213 N. Y. Supp. 52; *LaFollette v. Noble*, 13 Misc. 574, 34 N. Y. Supp. 955; *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636; *Myers v. King*, 48 Hun 106, 15 St. Rep. 482; *Cohen v. Ellis*, 52 Hun 133, 5 N. Y. Supp. 133.

79. *Francis v. New York & Brooklyn R. Co.*, 108 N. Y. 93. "A party proposing to rescind a contract is not permitted to deal with or change the nature of the property received by him, and then insist upon his right to rescind by returning the new article which has in that manner come into his possession." *Cohen v. Ellis*, 52 Hun 133, 5 N. Y. Supp. 133.

80. *Sheffer v. Diety*, 83 N. Y. 300.

81. *Keefuss v. Weilmunster*, 89 App. Div. 306, 85 N. Y. Supp. 913.

82. *Shiffer v. Dietz*, 83 N. Y. 300; *Weigel v. Cook*, 237 N. Y. 136.

83. *Weigel v. Cook*, 237 N. Y. 136;

Castiglia v. Lucas, 132 Misc. 430, 230 N. Y. Supp. 116. "We take it that the doctrine of election is one of substance and not of mere words. Using the property may or may not be a ratification of the contract according to the circumstances. When it appears that the acts performed are inconsistent with the claim of repudiation, then, and then only, can there be an election to confirm and adopt the contract. A particular act for which an authority may be cited as indicating an adoption of a contract may under other circumstances have no such force and effect." *Weigel v. Cook*, 237 N. Y. 136.

84. *Weigel v. Cook*, 237 N. Y. 136.

85. *Barr v. New York, etc., R. Co.*, 125 N. Y. 263; *Trowbridge v. Oehmsen*, 207 App. Div. 740, 202 N. Y. Supp. 833, affirmed, 241 N. Y. 264.

86. *Keefuss v. Weilmunster*, 89 App. Div. 306, 85 N. Y. Supp. 913.

7. Transfer of contract.

If one induced to enter into a contract by fraudulent representations, after a discovery of fraud, transfers his interest in the contract to a third party, the court is justified in concluding that he has waived the fraud and ratified the contract.⁸⁷

8. Purchase of property subject to mortgage.

One who has purchased property subject to a mortgage, the amount thereof being deducted from the consideration for the property, is not in a position to have the mortgage rescinded. Equitable principles do not permit a profit of this character.⁸⁸

9. Insurance policies.

The holder of a policy of life insurance is not entitled to maintain an action for the rescission of the policy and the recovery of premiums, where after the discovery of the fraud, he has paid an accruing premium. And this is true, although accompanying the payment of the premium is a notice that the payment was made without prejudice to the right to rescind the policy.⁸⁹ For similar reasons, the insurance company will not be allowed to maintain an action for the rescission of the policy if it has accepted a premium after the discovery of the fraud claimed to render the policy voidable.⁹⁰ But a mere temporary retention of the premium does not, under all circumstances, establish an intention to ratify the policy.⁹¹

10. Estoppel.

Where a mortgagor, upon the assignment of a mortgage to a third party, has signed a certificate as to the validity of the mortgage, he and his representatives are estopped

⁸⁷. *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636; *Treacy v. Hecker*, 51 How. Pr. 69.

⁸⁸. *People's Trust Co. v. Doolittle*, 178 App. Div. 802, 165 N. Y. Supp. 813.

⁸⁹. *McNaught v. Equitable Life, etc.*,

Soc., 136 App. Div. 774, 121 N. Y. Supp. 447.

⁹⁰. *Travelers Ins. Co. v. Pomerantz*, 218 App. Div. 431, 218 N. Y. Supp. 490, reversed on other grounds, 246 N. Y. 63.

⁹¹. *Travelers Ins. Co. v. Pomerantz*, 246 N. Y. 63.

as against the assignee from asserting that the mortgage was without consideration.⁹²

I. Parties in *pari delicto*.

Equity will not permit one to take advantage of his own wrong.⁹³ If both parties to an illegal contract are *in pari delicto*, equity will aid neither. The equitable maxim is applied that, "He who comes into equity, must come with clean hands."⁹⁴ Thus, a contract which is illegal as compounding a felony will not ordinarily be cancelled on that ground.⁹⁵ Or, if two persons are *in pari delicto* in a scheme to defraud a third person, equity will not intervene in favor of either, but will leave them in the position, relative to each other, in which they have placed themselves by their own acts.⁹⁶

If one with intent to defraud his creditors, transfers his

92. *Schenck v. O'Neill*, 23 Hun 209.

93. *Swartzlander v. Swartzlander*, 127 Misc. 801, 217 N. Y. Supp. 467.

94. *Schermerhorn v. Talman*, 14 N. Y. 93; *Lake v. Lake*, 136 App. Div. 47, 119 N. Y. Supp. 686; *Georgia Bldg. Co. v. Burdett*, 150 N. Y. Supp. 27; *Smith v. Rowley*, 66 Barb. 502; *Simpson v. Case Threshing Mach. Co.*, 170 N. Y. Supp. 166; *Woodworth v. Janes*, 2 Johns. Cas. 417; *Harrington v. Bigelow*, 11 Paige 349.

The maxim is that "he who would come into a court of equity must come with clean hands." This does not mean that he who comes into equity must be a clean person or even that he must be a person of good character or without a criminal record, but it means that his actions with respect to the particular transaction under consideration must not have been such that the conscience of the court revolts at granting the relief sought. The cases in which this maxim is usually applied arise where parties have put their property out of their hands to evade the just claims of creditors. Under such circumstances, with some exceptions, a court of equity will leave a grantor in the bed which he has

made. *Buszozak v. Volo*, 125 Misc. 546, 211 N. Y. Supp. 557.

Maintenance.—A. claiming title under the Connecticut Susquehanna Company to land situate in the state of Pennsylvania, and claimed by that state, sold the land to B. who gave him notes for the purchase money, part of which was paid; and A. executed to B. a quitclaim deed for the land. B. afterwards filed his bill in chancery, praying that A. might be perpetually enjoined from assigning the notes, or proceeding at law to recover the amount; and that the money paid might be refunded; it was held that the sale was maintenance, in selling a pretended title, and that both parties being *in pari delicto*, a court of equity would not relieve either; and the bill was, therefore, dismissed. *Woodworth v. Janes*, 2 Johns. Ch. 417.

95. *Doucet v. Massachusetts Bonding Ins. Co.*, 130 App. Div. 599, 167 N. Y. Supp. 892; *Smith v. Rowley*, 66 Barb. 502; *Harrington v. Bigelow*, 11 Paige 349. See also, *Loomis v. Cline*, 4 Barb. 453.

96. *Watkins v. Jones*, 78 Hun 496, 29 N. Y. Supp. 557; *Bolt v. Rogers*, 3 Paige 154.

property to another, equity will not ordinarily aid him to rescind the transaction.⁹⁷ But, if the transfer is between persons in confidential relations and was induced by false representations that the grantor was liable for an obligation, for which in fact he was not liable, a court of equity may cancel the deed. In such a case the parties do not stand upon equal terms, and the guilty party cannot avail himself of the plea of *particeps criminis*.⁹⁸ The instrument may be cancelled, if, in addition to the fraudulent purpose of defrauding creditors, it is shown that the grantor was of feeble mind and was under the influence of the grantee.⁹⁹ And, if, in fact, there was no actual indebtedness, it has been held that the fear of the confiscation of the premises by the Federal government by reason of the grantor's conviction of a violation of the National Prohibition Act, is not a sufficient ground to bar the cancellation of a deed which was not delivered.¹ Where, after an automobile accident, a party transferred his home with a view of saving it from a judgment in a possible negligence action, but he never conceded that he was liable for the accident, and the action was never brought and no claim was ever made that he was responsible therefor, it was held that he was not barred from maintaining an action to rescind the deed.²

Although the original parties to an illegal transaction might have been considered *in pari delicto*, on the death of one, his personal representative is not so considered and may maintain the action.³

97. *Mullin v. Mullin*, 119 App. Div. 521, 104 N. Y. Supp. 323; *Simis v. Simis*, 146 App. Div. 655, 131 N. Y. Supp. 460; *Lynch v. Jones*, 179 App. Div. 613, 166 N. Y. Supp. 1047; *O'Brien v. O'Brien*, 188 App. Div. 309, 177 N. Y. Supp. 25.

98. *Boyd v. De La Montagnie*, 73 N. Y. 498.

99. *Mullin v. Mullin*, 119 App. Div. 521, 104 N. Y. Supp. 323.

1. *Buszozak v. Volo*, 125 Misc. 546, 211 N. Y. Supp. 557.

2. *Tiedemann v. Tiedemann*, 201 App. Div. 614, 194 N. Y. Supp. 782, affirmed, 236 N. Y. 534.

3. *Zimmerman v. Kinkle*, 108 N. Y. 282. "The terms of the complaint show

clearly enough that the bond is founded on a consideration condemned both by morals and public policy, and, therefore, the defendant claims that a party to it cannot be relieved, but must be left to the consequences of the forbidden transaction. How this might be if the action were by the plaintiffs in their individual capacity, it is not necessary to inquire. They come into court as executors of a deceased person and in a representative character. If *in delicto* at all, they are not *in pari delicto*, and the enforcement of the rule would secure to the defendant the enjoyment of money which never belonged to his principals, and which did belong to the estate in the honest man-

J. Discretion of court.

It is within the discretion of the court whether it will interfere affirmatively and decree the cancellation of an invalid contract.⁴ If there is an adequate remedy at law, the plaintiff may be denied equitable relief.⁵ The vigilance or laches of the complaining party may well be considered on the question of discretion.⁶ Whether a court of equity will assume jurisdiction of the controversy depends upon the particular circumstances of the case.⁷ But in entertaining or declining jurisdiction, the court does not act capriciously, but is guided by principles which have gradually been evolved in the course of adjudication.⁸

agement of which the plaintiffs also owed a duty to the testator's beneficiaries. Nor should the defendant be heard to complain of this. He admits by his demurrer that the money was trust money and that he received it from the plaintiffs as executors and trustees. They had no power to part with it for the purpose for which he received it, and in seeking to recover it back they are merely performing a duty in the execution of which a court of equity may properly assist." *Zimmerman v. Kinkle*, 108 N. Y. 282.

4. *Town of Venice v. Woodruff*, 62 N. Y. 462; *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Becker v. Church*, 115 N. Y. 562; *Calhoun v. Millard*, 121 N. Y. 69; *Field v. Holbrook*, 6 Duer (13 Super. Ct.) 597, 14 How. Pr., 103; *Noah v. Webb*, 1 Edw. Ch. 604; *Hamilton v. Cummins*, 1 Johns. Ch. 517. "The jurisdiction of a court of equity to compel the surrender and cancellation of written instruments obtained by fraud, or which being void for any reason may, if outstanding, subject the plaintiff to loss or injury, is very ancient and has been frequently exercised. The plaintiff seeking this relief invokes the equitable powers of the court, and the court grants or refuses it, in the exercise of a sound discretion, according to the circumstances of the particular case. The granting of this relief cannot be

claimed as a matter of 'absolute right *ex debito justitiæ*, such as a party has to recover an amount due on a contract or for damage for a tort.' The existence of jurisdiction and the fact that plaintiff makes out that the instrument of which he seeks the surrender and cancellation is void, are not conclusive of his right to a final decree in his favor. The court may, nevertheless, refuse to exercise the jurisdiction and leave the party to his defense at law, when the instrument is sought to be enforced against him. But in entertaining or declining jurisdiction, the court does not act capriciously, but is guided by principles, which have gradually been evolved in the course of adjudication." *Calhoun v. Millard*, 121 N. Y. 69.

5. See, *supra*, I-E, Necessity of relief.

6. *Calhoun v. Millard*, 121 N. Y. 69.

7. *McHenry v. Hazard*, 45 N. Y. 580; *Town of Springport v. Teutonia Sav. Bank*, 75 N. Y. 397; *Calhoun v. Millard*, 121 N. Y. 69.

Pleading circumstances.—It has been thought, that, where the application is made to the discretionary power of the court, the special circumstances justifying the exercise of equitable powers must be set forth in the complaint. *Field v. Holbrook*, 6 Duer (13 Super. Ct.) 597, 14 How. Pr. 103.

8. *Calhoun v. Millard*, 121 N. Y. 69.

ARTICLE II.

GROUNDS FOR RESCISSION.

A. Fraud or misrepresentation.

1. In general.

The ground usually urged for the cancellation of a written instrument is the fraud of the defendant. Equity is vigilant to detect frauds and to relieve innocent parties from the effect of instruments procured by fraudulent means. Hence, as a general rule, equity assumes jurisdiction of an action to rescind an instrument, the execution whereof has been accomplished by fraud.⁹ A party seeking the aid of a court of equity to rescind a contract on the ground of fraud ordinarily must establish: (1) the representation and its falsity; (2) reliance on the representation; and (3) the materiality of the representation.¹⁰ "Any statement of an existing fact material to the person to whom it is made that is false and known by the person making it to be false, and which is made to induce the execution of a contract, and which does induce the contract, constitutes a fraud that will sustain an action to avoid the contract, if the person making it is injured thereby."¹¹ But mere statements of praise or commendation of property made by a seller will not constitute a fraudulent representation.¹²

9. *Becker v. Church*, 115 N. Y. 562; *Jones v. Jones*, 120 N. Y. 589; *Callanan v. Keeseville, etc.*, R. Co., 199 N. Y. 268; *Leary v. Geller*, 224 N. Y. 56; *McNally v. Fitzsimmons*, 70 App. Div. 179, 75 N. Y. Supp. 331; *Pruyn v. McCreary*, 105 App. Div. 302, 93 N. Y. Supp. 995, affirmed without opinion, 182 N. Y. 568; *Hedges v. Pioneer Iron Works*, 166 App. Div. 208, 151 N. Y. Supp. 495; *Whalen v. Hudson Hotel Co.*, 183 App. Div. 316, 170 N. Y. Supp. 855; *Kaston v. Zimmerman*, 192 App. Div. 511, 183 N. Y. Supp. 615; *Wolff v. Altman*, 196 App. Div. 549, 187 N. Y. Supp. 902; *Blum v. Hoffkins*, 210 App. Div. 748, 206 N. Y. Supp. 587; *Ruckstuhl v. Healy*, 222 App. Div. 153, 225 N. Y. Supp. 570; *LaFollette v. Noble*, 13 Misc. 574, 34 N. Y. Supp. 955; *Forster v. Wilshusen*,

14 Misc. 520, 35 N. Y. Supp. 1083; *Cherrie v. Reynolds*, 108 Misc. 732, 178 N. Y. Supp. 339; *McDonald v. Neilson*, 2 Cow. 139; *Whelan v. Whelan*, 3 Cow. 537; *Apthorpe v. Comstock*, Hopk. Ch. 143, affirmed, 8 Cow. 386; *Ranney v. Warren*, 13 Hun 11; *Ranney v. Warren*, 17 Hun 111; *Bushnell v. Harford*, 4 Johns. Ch. 301; *Hyman v. Friedman*, 18 N. Y. Supp. 446, 45 St. Rep. 636, affirmed on opinion below, 138 N. Y. 639; *Thompson v. Graham*, 1 Paige 384; *Tallman v. Green*, 3 Sandf. (5 Super. Ct.) 437.

10. *Ressler v. Samphinor Holding Corp.*, 201 App. Div. 344, 194 N. Y. Supp. 363; *Masterton v. Beers*, 1 Sweetney (31 Super. Ct.) 406.

11. *Adams v. Gillig*, 199 N. Y. 314.

12. *Taylor v. Fleet*, 4 Barb. 95.

2. Misrepresentation not amounting to fraud.

A distinction is made between the misrepresentations required for an action at law for damages and those which permit an equitable action of rescission. In order to recover damages it is required that the plaintiff show that the defendant knew that the statement was false at the time he made it, or else, not knowing whether it was false or true and not caring what the fact might be, he made it recklessly paying no heed to the injury which might ensue.¹³ The rule in equity is more liberal.¹⁴ Equity will rescind a transaction which has been consummated through a misrepresentation of a material fact not amounting to fraud.¹⁵ As is explained in another place,¹⁶ rescission will lie where a contract is entered into by reason of a mistake of one party. A mistake or an innocent misrepresentation of a material fact will justify the cancellation of a written instrument.¹⁷ Equity will, in a proper case, avoid and set aside a transaction induced or procured through material misrepresentations and false statements although the statements and representations were honestly made with no intent to deceive.¹⁸ A plaintiff who has charged fraud as the basis for his action may be allowed to amend his complaint so as to allege mistake as the ground for relief.¹⁹ And, although fraud has

13. *Hammond v. Pennock*, 61 N. Y. 145; *Bloomquist v. Parson*, 222 N. Y. 375; *Sparer v. Travelers' Ins. Co.*, 185 App. Div. 861, 173 N. Y. Supp. 673; *Wood v. Dudley*, 188 App. Div. 136, 176 N. Y. Supp. 494. See also, *Seneca Wire & Mfg. Co. v. A. B. Leach Co.*, 247 N. Y. 1.

Action at law after rescission.—The distinction mentioned in the text does not apply in an action at law, following an actual rescission, to recover what the plaintiff has delivered to the defendant. *Seneca Wire & Mfg. Co. v. A. B. Leach Co.*, 247 N. Y. 1.

14. *Bloomquist v. Parson*, 222 N. Y. 375.

15. *Hammond v. Pennock*, 61 N. Y. 145; *Leary v. Geller*, 224 N. Y. 56; *Bloomquist v. Farson*, 222 N. Y. 375; *Sparer v. Travelers' Ins. Co.*, 185 App. Div. 861, 173 N. Y. Supp. 673; *Wood v. Dudley*, 188 App. Div. 136, 176 N.

Y. Supp. 494; *Forster v. Wilshusen*, 14 Misc. 520, 35 N. Y. Supp. 1083; *Ryon v. Wanamaker*, 116 Misc. 91, 190 N. Y. Supp. 250, affirmed, 202 App. Div. 848, 194 N. Y. Supp. 977; *Clark v. Kirby*, 133 Misc. 229, 231 N. Y. Supp. 544; *Alker v. Alker*, 12 N. Y. Supp. 676; *Simpson v. Case Threshing Mach. Co.*, 170 N. Y. Supp. 166. Compare, *L. D. Garrett Co. v. Astor*, 67 App. Div. 595, 73 N. Y. Supp. 966; *Tallman v. Green*, 3 Sandf. (5 Super. Ct.) 437.

16. See, *infra*, II-B-2, Unilateral contract.

17. *Wood v. Dudley*, 188 App. Div. 136, 176 N. Y. Supp. 494; *Knapp v. Fowler*, 30 Hun 512; *Simpson v. Case Threshing Mach. Co.*, 170 N. Y. Supp. 166.

18. *Bloomquist v. Farson*, 222 N. Y. 375; *Leary v. Geller*, 224 N. Y. 56.

19. *Knapp v. Fowler*, 30 Hun 512.

been alleged, the plaintiff may be allowed to recover on proof of innocent material misrepresentations, without any amendment of the pleadings.²⁰

3. Materiality of representations.

Clearly, an instrument will not be rescinded on the ground of fraudulent representations unless the representations involved were material.²¹ The representation must be so material that its falsity renders it unconscientious to enforce the obligations created by the instrument.²² The plaintiff must show that he has been damaged by the representation,²³ although he need not show the amount of his damages with the certainty required in an action at law for money damages.²⁴ He must show some pecuniary loss or injury as the natural consequence of the conduct induced by the misrepresentation.²⁵ Fraud without resulting in pecuniary damage is not a ground for the exercise of remedial jurisdiction.²⁶

As a matter of defense, the defendant is allowed to produce evidence tending to show that the plaintiff has not been damaged by the misrepresentations relied upon by the plaintiff.²⁷ Thus, in an action to rescind a purchase of property, the defendant should be allowed to show that the value of the property was more than the consideration paid by the plaintiff.²⁸

20. *Bloomquist v. Farson*, 222 N. Y. 375.

21. *Masterton v. Beers*, 1 *Sweeney* (31 *Super. Ct.*) 406.

Cost.—A substantial misrepresentation by a vendor of the price paid by him for property may be material. *Clark v. Kirby*, 133 *Misc.* 229, 231 N. Y. *Supp.* 544.

22. *Hewlett v. Saratoga Carlsbad Spring Co.*, 84 *Hun* 248, 32 N. Y. *Supp.* 697.

23. *Ressler v. Samphnor Holding Corp.*, 201 *App. Div.* 344, 194 N. Y. *Supp.* 363; *Stevens v. Huber*, 3 *Misc.* 599, 23 N. Y. *Supp.* 343, 52 *St. Rep.* 856; *Comm. Credit Corp. v. Third & Lafayette Sts. Garage*, 131 *Misc.* 786, 228 N. Y. *Supp.* 166; *Jelenk v. Albert*, 133 *Misc.* 28, 231 N. Y. *Supp.* 31.

Complaint need not allege that plain-

tiff was damaged. See *John V. Reynolds*, 115 *App. Div.* 647, 101 N. Y. *Supp.* 293.

24. *Haessig v. Gregory*, 197 *App. Div.* 111, 188 N. Y. *Supp.* 500.

25. *Hewlett v. Saratoga Carlsbad Spring Co.*, 84 *Hun* 248, 32 N. Y. *Supp.* 697.

26. *Stevens v. Huber*, 3 *Misc.* 599, 23 N. Y. *Supp.* 343, 52 *St. Rep.* 856; *Hewlett v. Saratoga Carlsbad Spring Co.*, 84 *Hun* 248, 32 N. Y. *Supp.* 697.

27. *Hewlett v. Saratoga Carlsbad Spring Co.*, 84 *Hun* 248, 32 N. Y. *Supp.* 697.

28. *Stevens v. Huber*, 3 *Misc.* 599, 23 N. Y. *Supp.* 343, 52 *St. Rep.* 856; *Jelenk v. Albert*, 133 *Misc.* 28, 231 N. Y. *Supp.* 31; *Hewlett v. Saratoga Carlsbad Spring Co.*, 84 *Hun* 248, 32 N. Y. *Supp.* 697.

4. Falsity of statements.

The plaintiff must allege and prove the falsity of the representations.²⁹ It may not be necessary to show that the defendant was aware of the falsity, but a variance between the representation and the actual facts is necessary.

5. Reliance on representations.

One of the necessary elements for relief on the allegation of fraudulent representations is that the complaining party should have relied on the representations.³⁰ If he did not so rely, the case is not proved. Reliance may be a question of fact.³¹ The fact that the purchaser of property may have made some inquiries to verify the statements of the seller, does not necessarily show that he did not rely on such statements.³² One may be entitled to rely on the statements of the seller of an apartment as to the number of rooms on a floor.³³ Where a series of similar transactions is shown, a representation made on an earlier transaction may be shown, and the plaintiff may claim reliance on such representation when entering into the later transaction.³⁴

6. Negligence in discovery of fraud.

A cause of action based on fraud will not be defeated by the plaintiff's negligence in discovering or averting the fraud.³⁵ Thus, if the nature of a written instrument is misrepresented, the fact that it is signed without being read, does afford a defense.³⁶ Or, if a seller of property makes a

29. *Ritzwoller v. Lurie*, 176 App. Div. 100, 162 N. Y. Supp. 475; *Ressler v. Samphimor Holding Corp.*, 201 App. Div. 344, 194 N. Y. Supp. 363; *Stein v. Freund*, 215 App. Div. 149, 213 N. Y. Supp. 9; *Tallman v. Green*, 3 Sandf. (5 Super. Ct.) 437; *Masterton v. Beers*, 1 Sweeney (31 Super. Ct.) 406.

30. *Ressler v. Samphimor Holding Corp.*, 201 App. Div. 344, 194 N. Y. Supp. 363; *Masterton v. Beers*, 1 Sweeney (31 Super. Ct.) 406.

31. *Kaston v. Zimmerman*, 192 App. Div. 511, 183 N. Y. Supp. 615.

32. *Daiker v. Strelinger*, 28 App. Div. 220, 50 N. Y. Supp. 1074.

33. *Kaston v. Zimmerman*, 192 App. Div. 511, 183 N. Y. Supp. 615.

34. *Chisholm v. Eisenhuth*, 69 App. Div. 134, 74 N. Y. Supp. 496.

35. *Forster v. Wilshusen*, 14 Misc. 520, 35 N. Y. Supp. 1083.

Mistake.—The rule is not so lenient when rescission is sought on the ground of mistake. See, *infra*, II-B, Mistake.

36. *Witthaus v. Schack*, 24 Hun 328; *Knauer v. Globe Mut. L. Ins. Co.*, 16 Jones & S. (48 Super. Ct.) 454; *Smith v. Smith*, 11 N. Y. Supp. 630, 34 St. Rep. 116, affirmed, 134 N. Y. 62; *Keenan v. Keenan*, 12 N. Y. Supp. 747, 34 St. Rep. 996. See also, *Johnson v. Wetmore*, 12 Barb. 433.

positive statement concerning the same, the purchaser is not required to verify the statement by an examination of records or a recourse to other means of information.³⁷ Particularly is this true when the plaintiff, by the acts of the defendant, has been diverted from making inquiries of third persons.³⁸ But, in the absence of fraud or mistake, a person signing an instrument is chargeable with knowledge of its contents.³⁹

7. Misrepresentation of law.

A misrepresentation as to a matter of law or the legal effect of an instrument, may be sufficient to cause a court of equity to direct a rescission. Thus, where a man was induced by misrepresentations as to his legal liability, to assign mortgages as security for an obligation incurred by his wife, the assignments were cancelled.⁴⁰ An agreement made between the next of kin of a deceased as to the disposition of his estate, has been rescinded, where it appeared that it was signed in ignorance of the legal rights of the parties and under erroneous misstatements as to such rights.⁴¹ A settlement of a claim against an insurance company effected by false representations as to the liability of the company, has been rescinded.⁴²

37. *Knapp v. Fowler*, 30 Hun 512.

38. *Forster v. Wilshusen*, 14 Misc. 520, 35 N. Y. Supp. 1083.

39. *Fitz-Gibbon v. Parker*, 143 App. Div. 463, 128 N. Y. Supp. 539. "A party to a written instrument may have the instrument set aside as fraudulent, where he shows that by reason of false representations of the other party he was justified in believing that the papers that he was signing was not an agreement, or where there was no opportunity to examine the written instrument, and the party signing it was by reason of the peculiar circumstances justified in accepting the other party's representation as to its contents. No case, however, has been cited to us where a written agreement has been set aside as fraudulent, where

the only alleged false representation consisted of a statement that the agreement embodied the terms already agreed upon, and where there was opportunity given for the examination of the contents of the agreement, and both parties understood that the agreement was intended to be a binding contract, and the party claiming fraud acted under the agreement as long as it was to his own benefit." *Moloughney v. White*, 163 N. Y. Supp. 532.

40. *Ryon v. Wanamaker*, 116 Misc. 91, 190 N. Y. Supp. 250, affirmed, 202 App. Div. 848, 194 N. Y. Supp. 977.

41. *Busch v. Busch*, 12 Daly 476, affirmed without opinion, 102 N. Y. 672; *Alker v. Alker*, 12 N. Y. Supp. 676.

42. *Berry v. American Central Ins. Co.*, 132 N. Y. 49.

8. Statements of future events.

It is the general rule that the failure of future events to happen as it is represented that they will, does not constitute fraud.⁴³ But, on the other hand, fraud may be inferred from a statement that certain events will happen or that certain acts will be done, when it is known at the time the statement is made that such events will not happen or that the acts in question will not be done.⁴⁴ Thus, if a mortgage is secured without consideration on the fraudulent representation that the moneys secured thereby will be delivered immediately on its execution, the mortgage may be cancelled.⁴⁵ Or, if one having building lots in a residential section of a city, is induced to sell a portion of the lots on the false representation of the purchaser that he desires to build a residence, when in fact he is contemplating the construction of a public garage, the deed may be cancelled.⁴⁶ Likewise, a contract for the purchase of real estate may be rescinded, where it appears that the purchase was induced by the promise of the seller that he would finance the erection of a house on the premises, when in fact he had no such intention.⁴⁷ But ordinarily a charge of fraud is not to be sustained by reason of promises made by a party that he would not insist on the performance of certain stipulations made in a written contract.⁴⁸

9. Fraud of agent.

A principal is generally bound by the misrepresentations of his agent.⁴⁹ But, in an action of rescission it is not important whether an agent has acted within or without the

43. *Interstate Chemical Corp. v. Duke*, 92 Misc. 519, 156 N. Y. Supp. 244, affirmed, 176 App. Div. 684, 163 N. Y. Supp. 1035; *Francis v. New York, etc., R. Co.*, 17 Abb. N. C. 1, affirmed, 108 N. Y. 93. See also, *Dennerlein v. Martin*, 247 N. Y. 145.

44. *Adams v. Gillig*, 199 N. Y. 314; *Ritzwoller v. Lurie*, 225 N. Y. 464; *Copeland v. Hugo*, 221 App. Div. 779, 223 N. Y. Supp. 642. See also, *Kley v. Healy*, 127 N. Y. 555.

45. *Hyman v. Friedman*, 18 N. Y. Supp. 446, 45 St. Rep. 636, affirmed on opinion below, 138 N. Y. 639.

46. *Adams v. Gillig*, 199 N. Y. 314.

47. *Moore v. Abbey*, 213 App. Div. 787, 210 N. Y. Supp. 766.

48. *Treacy v. Hecker*, 51 How. Pr. 69.

49. *Ressler v. Samphimor Holding Corp.*, 201 App. Div. 344, 194 N. Y. Supp. 363; *Martin v. Gotham Nat. Bank*, 220 App. Div. 541, 221 N. Y. Supp. 661; *Forster v. Wilshusen*, 14 Misc. 520, 35 N. Y. Supp. 1083; *White v. Hiawatha, etc., Corp.*, 123 Misc. 868, 206 N. Y. Supp. 847; *Clark v. Kirby*, 133 Misc. 229, 231 N. Y. Supp. 544.

scope of his employment.⁵⁰ A corporation may be bound by the acts of a stockholder owning a majority of its stock and having control of its operations.⁵¹ A principal who accepts the results of the efforts of his agent is deemed to have adopted the method employed to achieve the results.⁵² So far as an action of rescission is concerned, the statements of one employed to sell property are binding on the owner, although the statements are not authorized by him.⁵³

10. Condition of value of property purchased.

A misrepresentation as to the condition of property purchased may be sufficient to warrant a decree avoiding the transaction. Thus, relief may be granted to one who purchased a house relying upon the seller's untrue statement that the cellar was dry and that the water in the cellar at the time of inspection was the result of a freshet, and the seller induced the purchaser not to make any inquiries of neighbors as to the facts.⁵⁴ Likewise, in a proper case, a sale of an apartment house may be rescinded where the seller has falsely represented the number of rooms on each floor.⁵⁵ Fraudulent representations of a seller of chattels as to the quality thereof, may induce a court of equity to rescind the sale.⁵⁶ But the usual commendations by a seller as to the virtues of his property are to be guarded against by the purchaser by an examination of the premises, and do not afford grounds for a rescission.⁵⁷

50. *Clark v. Kirby*, 133 Misc. 229, 231 N. Y. Supp. 544.

51. *Cawthra v. Stewart*, 59 Misc. 38, 109 N. Y. Supp. 770.

52. *Bloomquist v. Farson*, 222 N. Y. 375.

53. *Forster v. Wilshusen*, 14 Misc. 520, 35 N. Y. Supp. 1083.

54. *Greenman v. Watkins*, 18 Week. Dig. 122.

55. *Kaston v. Zimmerman*, 192 App. Div. 511, 183 N. Y. Supp. 615.

56. *Hewlett v. Saratoga Carlsbad Spring Co.*, 84 Hun 248, 32 N. Y. Supp. 697.

57. *Taylor v. Fleet*, 4 Barb. 95. "It would be impolitic, and often unjust, to set aside a sale merely because the seller had warmly commended the

qualities of the property, and the buyer had been consequently disappointed. The rule in such cases is '*simplex commendatio non obligat.*' Purchasers are often, perhaps generally, disappointed in reference to some supposed quality of what they obtain. To allow them to escape from their bargains for such causes would generate great carelessness on their part, and would constitute a fruitful source of litigation. It would create an uncertainty in our sales which, particularly as to those which relate to real estate, would be most mischievous. These considerations should of course apply only to cases free from fraud. Where that exists, the perpetrator should bear all the consequent losses,

Ordinarily an assertion by a seller as to the value of his property is regarded merely as a matter of opinion, and does not furnish sufficient ground for the cancellation of the agreement of sale.⁵⁸ But a misrepresentation of the past income of property is one of fact and may justify relief.⁵⁹ And it is recognized that in a particular case a statement as to value may be one of fact, not merely an opinion.⁶⁰ A statement that a mortgage is "good as gold" may be one of fact, and a proposed purchaser is not necessarily required to examine the records to discover the value of the mortgage.⁶¹ Where the buyer has not equal means of knowing the value and he is induced by the seller to forbear making inquiry and damage results, or where the seller knows that the buyer has no knowledge of the value of the property although he in no way induced him to forbear making inquiry and especially where the seller is an expert as to the value of the property offered for sale, and the buyer is not, a false and fraudulent representation as to its value if relied on by the purchaser makes the seller liable.⁶² Where knowledge in relation to the condition and value of foreign real estate, proposed to be exchanged for other real property, is confined entirely to its owners, representations as to its value made by them to vendees are not mere non-actionable expressions of opinion, but constitute statements of fact, which, when shown to be false, entitle the defrauded vendees to maintain an action for the cancellation of their own deed.⁶³

and the courts should not hesitate to encounter any labor which may be requisite to detect and punish it." *Taylor v. Fleet*, 4 Barb. 95.

58. *Hutchinson v. Brown, Clarke* 408. See also, *Taylor v. Fleet*, 4 Barb. 95.

59. *Hutchinson v. Brown, Clarke* 408.

60. *Merry Realty Co. v. Martin*, 103 Misc. 9, 169 N. Y. Supp. 696. "It is undoubtedly true that a mere statement as to the value of property in negotiations for a sale, standing alone, where the subject of the representations is equally open to both parties for examination, furnishes no ground for relief; but here the defendants not

only had superior, but the only knowledge on the subject, and, therefore, the statements were something more than expressions of opinion, they were statements of facts, and if such statements were false, and made with the intent to defraud, and did defraud, then they vitiated the transaction and subjected the defendants to damages." *Daiker v. Strelinger*, 28 App. Div. 220, 50 N. Y. Supp. 1074.

61. *Knapp v. Fowler*, 30 Hun 512.

62. *Merry Realty Co. v. Martin*, 103 Misc. 9, 169 N. Y. Supp. 696.

63. *Daiker v. Strelinger*, 28 App. Div. 220, 50 N. Y. Supp. 1074. See also, *Bradley v. Bradley*, 1 Barb. Ch. 125.

11. Marketability of title.

A conveyance of real estate, or a contract for the sale thereof, may be rescinded if the purchaser has been deceived as to the marketability of the vendor's title.⁶⁴ An unpaid judgment which is a lien against the premises may be sufficient to justify the rescission of the transaction.⁶⁵ The fact, however, that some person claims an adverse title or interest in the premises does not establish a defect in the title, for the claim must be substantial.⁶⁶

12. Insurance policies.

If the issuance of an insurance policy is procured by fraudulent representations, the company may maintain an equitable action for its cancellation.⁶⁷ A court of equity is especially moved to grant such relief where the policy after the lapse of a specified time becomes incontestable.⁶⁸ The reinstatement of a policy, when induced by false statements, may be rescinded.⁶⁹ Or, if the company fraudulently secures the cancellation of a policy, the assured may maintain an action for the rescission of the cancellation.⁷⁰ An assignment of a life insurance policy may be rescinded, where it is shown that fraud prompted the transfer.⁷¹ A release procured by a representative of an insurance company may be set aside at the suit of the insured, satisfactory evidence of fraud in the procurement of the release being shown.⁷² An

64. See, *Thomson v. Howd*, 21 Misc. 429, 47 N. Y. Supp. 1071.

65. *Wright v. Deniston*, 9 Misc. 79, 29 N. Y. Supp. 718, 59 St. Rep. 549.

66. *Todaro v. Somerville Realty Co.*, 136 App. Div. 767, 121 N. Y. Supp. 440.

67. *Travelers' Ins. Co. v. Pomerantz*, 246 N. Y. 63; *Travelers' Ins. Co. v. Snyder*, 127 Misc. 66, 215 N. Y. Supp. 276; *Equitable L. Assur. Co. v. Rillat*, 127 Misc. 68, 215 N. Y. Supp. 277. See also, *Sparer v. Travelers' Ins. Co.*, 185 App. Div. 861, 173 N. Y. Supp. 673.

68. *Travelers' Ins. Co. v. Snyder*, 127 Misc. 66, 215 N. Y. Supp. 276, holding that the action is not defeated by the death of the insured.

69. **Application not attached to policy.**—In an action to rescind the reinstatement of a policy, an affirmative

defense to the effect that the application for reinstatement was not attached to or indorsed upon the policy, and that pursuant to section 58 of the Insurance Law the failure to attach or indorse the application upon the policy deprived the plaintiff of the right to avoid the policy, is good, since under the statute plaintiff had a responsibility which required that it attach such applications to its policies. *New York L. Ins. Co. v. Rosen*, 133 Misc. 335, 232 N. Y. Supp. 37.

70. *Berry v. American Central Ins. Co.*, 132 N. Y. 49. See also, *Knauer v. Globe Mut. L. Ins. Co.*, 16 Jones & S. (48 Super. Ct.) 454.

71. *Lewery v. Simpson*, 196 App. Div. 555, 187 N. Y. Supp. 865.

72. *Jones v. Commercial Travelers' Mut. A. Assn.*, 114 N. Y. Supp. 589,

appraisal of the loss under a fire insurance policy may, in a proper case, be set aside.⁷³

13. Transfer of securities.

An action may be maintained to rescind a purchase or a transfer of corporate stock or securities, where the transaction has been consummated through fraud.⁷⁴ Even a material false representation, although not such as to constitute fraud, may justify the relief.⁷⁵ If one is induced by fraud to become a stockholder in a corporation, and thus to assume the liabilities which attach to a stockholder, equity will grant relief.⁷⁶ While the relief may be denied in the absence of any showing that an action at law will not afford an adequate remedy,⁷⁷ the plaintiff can usually show the inadequacy of an action for damages and the equitable relief will ordinarily be granted.⁷⁸ Thus, in a case where fraud is established, a subscription to the stock of a corporation may be cancelled.⁷⁹ In a proper case an exchange of stock may be rescinded.⁸⁰ Shares or subscriptions in a savings and loan company may be cancelled upon proof of fraudulent representations of the company's representatives.⁸¹

14. Judgments.

A judgment, either of an equitable or of a legal tribunal, if obtained by fraud, may be vacated by a court of equity.⁸²

affirmed, 134 App. Div. 936, 118 N. Y. Supp. 1116, modified, 201 N. Y. 576; Parton v. Metropolitan Life Ins. Co., 129 Misc. 493, 221 N. Y. Supp. 610.

73. Coon v. National Fire Ins. Co., 126 Misc. 75, 213 N. Y. Supp. 407.

74. Bosley v. National Machine Co., 123 N. Y. 550; Haessig v. Gregory, 197 App. Div. 111, 188 N. Y. Supp. 500; Amberg v. Allen, 207 App. Div. 571, 202 N. Y. Supp. 29; Wood v. Hill, 214 App. Div. 417, 212 N. Y. Supp. 550; Cawthra v. Stewart, 59 Misc. 38, 109 N. Y. Supp. 770; White v. Hiawatha, etc., Corp., 123 Misc. 868, 206 N. Y. Supp. 847. See also, Rose v. Merchants' Trust Co., 96 N. Y. Supp. 946.

75. Hill v. International Products Co., 129 Misc. 25, 220 N. Y. Supp. 711.

76. Bosley v. National Machine Co.,

123 N. Y. 550; Whalen v. Hudson Hotel Co., 183 App. Div. 316, 170 N. Y. Supp. 855.

77. Dennin v. Powers, 96 Misc. 252, 160 N. Y. Supp. 636.

78. Bosley v. National Machine Co., 123 N. Y. 550; Jahn v. Reynolds, 115 App. Div. 647, 101 N. Y. Supp. 293.

79. Whalen v. Hudson Hotel Co., 183 App. Div. 316, 170 N. Y. Supp. 855.

80. Jahn v. Reynolds, 115 App. Div. 647, 101 N. Y. Supp. 293.

81. Wareham v. Eagle Savings & Loan Co., 185 App. Div. 25, 171 N. Y. Supp. 800; Figueira v. Eagle Savings & Loan Co., 107 Misc. 101, 176 N. Y. Supp. 845.

82. Corwithe v. Griffing, 21 Barb. 9.

Particularly is this true when the judgment appears valid on its face and constitutes a cloud upon the title to real estate.⁸³

15. Evidence of fraud.

The impeachment of a written contract on the ground of fraud is not controlled by the "parol" evidence rule. Fraud, illegality, want of consideration, delivery upon an unperformed condition and the like may be shown by parol, not to contradict or vary, but to destroy a written instrument. Such proof does not recognize the contract as ever existing as a valid agreement and is received from the necessity of the case to show that that which appears to be, is not and never was a contract.⁸⁴ The parol evidence is admissible, although the written contract between the parties provides that no representations contrary to the terms of the contract shall be binding.⁸⁵

Evidence of similar transactions between the defendant and third persons may be received to show the fraudulent intent of the defendant.⁸⁶ While mere inadequacy of consideration does not constitute fraud, in connection with the other circumstances of the case, it may furnish evidence of fraud.⁸⁷

16. Sufficiency of proof of fraud.

As a general rule, there is no presumption of fraud, and the party who asserts that a transaction was the result of fraud is under the obligation of proving his assertion.⁸⁸ In

83. *Corwithe v. Griffing*, 21 Barb. 9.

84. *Interstate Chemical Corp. v. Duke*, 176 App. Div. 684, 163 N. Y. Supp. 1035; *Schickler v. Penrod Co., Inc.*, 222 App. Div. 627, 227 N. Y. Supp. 331; *White v. Hiawatha, etc., Corp.*, 123 Misc. 868, 206 N. Y. Supp. 847; *Simpson v. Case Threshing Mach. Co.*, 170 N. Y. Supp. 166.

85. *Simpson v. Case Threshing Mach. Co.*, 170 N. Y. Supp. 166.

86. *Chisholm v. Eisenhuth*, 69 App. Div. 134, 74 N. Y. Supp. 496.

87. *Jones v. Jones*, 120 N. Y. 589. See, *infra*, II-J, Inadequacy of consideration.

88. *Conlon v. Marsh*, 190 App. Div. 396, 180 N. Y. Supp. 204, affirmed without opinion, 232 N. Y. 594; *Westchester F. Ins. Co. v. Syracuse, etc., R. Co.*, 192 App. Div. 463, 183 N. Y. Supp. 251; *First Nat. Bank v. Wright*, 207 App. Div. 521, 202 N. Y. Supp. 774; *Giarratano v. McIlwain*, 215 App. Div. 644, 214 N. Y. Supp. 582; *Travelers' Ins. Co. v. Pomerantz*, 218 App. Div. 431, 218 N. Y. Supp. 490; *Russell v. Russell*, 220 App. Div. 282, 221 N. Y. Supp. 50; *Parfitt v. Kings Co. Gas Co.*, 12 Misc. 278, 33 N. Y. Supp. 1111, 67 St. Rep. 814; *Thompson v. Howd*, 21 Misc. 429, 47 N. Y. Supp. 1071; *Hewlett v. Saratoga Carlsbad*

some cases, however, where the parties are in confidential relations, an inference of undue influence or fraud is drawn when the stronger one secures an unfair advantage of the weaker.⁸⁹ The relation of husband and wife is not such a confidential relation.⁹⁰ Nor will fraud or undue influence be presumed from a transaction between a brother and sister.⁹¹

Fraud must be shown by at least a fair preponderance of evidence.⁹² The question whether fraud has been thus established is generally one of fact for the trial justice.⁹³ If the evidence is conflicting so that contrary conclusions may reasonably be entertained, an appellate court will not interfere with the finding.⁹⁴

B. Mistake.

1. Mutual mistake.

Mutual mistake of the parties to a written instrument is a recognized ground for its rescission in a court of equity.⁹⁵ If, by reason of a mutual mistake, or even of a unilateral mistake, the minds of the parties have not met, equity may assume jurisdiction.⁹⁶ If the parties have actually made a contract, which, however, by mutual mistake of the parties, has not been correctly expressed in the writing, a party may have a remedy in an action of Reformation.⁹⁷ The remedy

Spring Co., 84 Hun 248, 32 N. Y. Supp. 697; Spicer v. Spicer, 22 Jones & S. (54 Super. Ct.) 280; Schelling v. Bischoff, 29 Jones & S. (61 Super. Ct.) 68, 18 N. Y. Supp. 859, 46 St. Rep. 536.

Other grounds for relief.—The fact that the plaintiff alleges fraud as a ground for relief and fails to prove that allegation, does not deprive him of a rescission on other grounds which are alleged and established. Giarratano v. McIlwain, 215 App. Div. 644, 214 N. Y. Supp. 582.

89. Lange v. Lange, 185 App. Div. 259, 172 N. Y. Supp. 846. And see, *infra*, II-E, Transactions between persons in confidential relations.

90. Donlon v. Donlon, 154 App. Div. 212, 138 N. Y. Supp. 1039.

91. Spicer v. Spicer, 22 Jones & S. (54 Super. Ct.) 280.

92. Mason v. Wheeler, 2 Misc. 523, 24 N. Y. Supp. 879.

93. Hewlett v. Saratoga Carlsbad Spring Co., 84 Hun 248, 32 N. Y. Supp. 697.

94. Hewlett v. Saratoga Carlsbad Spring Co., 84 Hun 248, 32 N. Y. Supp. 697.

95. Paine v. Upton, 87 N. Y. 327; Crowe v. Lewin, 95 N. Y. 423; Dominicus v. U. S. Casualty Co., 132 App. Div. 553, 116 N. Y. Supp. 975; Dunn v. Dunn, 151 App. Div. 800, 136 N. Y. Supp. 282; L. D. Garrett Co. v. Halsey, 38 Misc. 438, 77 N. Y. Supp. 989; Barnes v. Carmack, 1 Barb. 392; Knapp v. Fowler, 30 Hun 512; Barnes v. Wintringham, 32 Hun 43; Busch v. Busch, 12 Daly 476, affirmed without opinion, 102 N. Y. 672; Houghton v. Houghton, 34 Hun 212.

96. Flynn v. Smith, 111 App. Div. 870, 98 N. Y. Supp. 56.

97. See the Chapter on Reformation.

in an action of Reformation declares and enforces the original obligation of the parties, while the remedy in an action of Rescission may cancel the written engagement without an adjudication as to the contract the parties intended to make. Rescission, however, may, in some cases, accomplish much the same result as a Reformation by leaving the parties unfettered by any written instrument and hence in a position to enforce any prior obligations.

A court of equity will give relief in cases of mutual mistake, unaccompanied by fraud, where the subject of the contract is so materially variant from what the parties supposed it to be that the substantial object of the contract has failed.⁹⁸ A release of claims under an accident insurance policy may be rescinded for mutual mistake as to the extent of the injury suffered by the plaintiff.⁹⁹ An exchange of lands may be rescinded where it is shown that the defendant did not own the lands which he conveyed to the plaintiff.¹ A deed made upon the apprehension of immediate death may be rescinded upon the recovery of the grantor.² But, it is not every kind of a mistake that will authorize an action of rescission, for, were such the rule, but few transactions could stand. As to many facts a party must rely upon his own circumspection and inquiry; and, if he has not been imposed on by the other party, he is held to his contract.³ Relief can be granted on the ground of mistake or ignorance only when it constitutes a material ingredient in the contract of the parties and disappoints their intention, or where it is inconsistent with good faith and proceeds from a violation of the obligations which are imposed upon the conscience of either party. Where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance does not afford ground for relief.⁴

A contract will not be rescinded on the ground of mistake, unless the mistake is clearly and satisfactorily established.

98. *Dunn v. Dunn*, 151 App. Div. 800, 136 N. Y. Supp. 282.

99. *Dominicis v. U. S. Casualty Co.*, 132 App. Div. 553, 116 N. Y. Supp. 975.

1. *Crowe v. Lewin*, 95 N. Y. 423.

2. *Houghton v. Houghton*, 34 Hun 212.

3. *Dambmann v. Schulting*, 75 N. Y. 55.

4. *Dambmann v. Schulting*, 75 N. Y. 55; *Taylor v. Fleet*, 4 Barb. 95.

If the matter is left in doubt, the contract will be left as executed.⁵

2. Unilateral mistake.

Mutual mistake is ground for the reformation, as well as for the rescission, of an instrument. Unilateral mistake, however, is not a sufficient ground for reformation;⁶ but furnishes, in a proper case, adequate ground for rescission.⁷ A mistake as to a material matter precludes the meeting of the minds of the parties.⁸ Especially is this so when the mistake of one party is accompanied by the fraud or other wrongful conduct of the other party.⁹ But, a court of equity will not give relief in all cases of mistake. There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examination and inquiry; and if not imposed upon or defrauded, he must be held to his contracts. In such cases, equity will not stretch out its arm to protect those who suffer for the want of vigilance.¹⁰

An executory contract for the purchase of lands may be rescinded on the ground of a mistake in the quantity of the land, notwithstanding the premises are described by metes and bounds and the terms "more or less" are added after a statement of the quantity, where the mistake on the part of the purchaser was caused by the misrepresentation of the

5. *Masterton v. Beers*, 1 Sweeney (31 Super. Ct.) 406.

6. See the Chapter on Reformation.

7. *Metzger v. Aetna Ins. Co.*, 227 N. Y. 411; *Drachler v. Foote*, 88 App. Div. 270, 84 N. Y. Supp. 977; *Harper v. Newburgh*, 159 App. Div. 695, 145 N. Y. Supp. 59; *Meyer v. Meyer*, 201 App. Div. 596, 194 N. Y. Supp. 718;

Gibbs v. New York L. Ins. Co., 14 Abb. N. C. 1; *Smith v. Mackin*, 4 Lans. 41.

8. *Harper v. Newburgh*, 159 App. Div. 695, 145 N. Y. Supp. 59.

9. *Haviland v. Willets*, 67 Hun 89, 21 N. Y. Supp. 1112, 51 St. Rep. 747, reversed on other grounds, 141 N. Y. 35.

10. *Dambmann v. Schulting*, 75 N. Y. 55.

vendor, although not fraudulently made, and where the mistake so essentially affected the value of the premises that the contract would not have been made had it not existed.¹¹ Where a contractor bidding on a municipal contract by mistake transposed two items and did not discover the mistake until his bid had been accepted, equity has power to rescind the contract. Under the circumstances, the court, at the suit of the bidder, may rescind the contract, even though a formal written contract was subsequently to be executed.¹²

But ignorance through negligence or inexcusable trustfulness will not relieve a party from his contract obligations. He who signs or accepts a written contract, in the absence of fraud or other wrongful conduct on the part of another contracting party, is conclusively presumed to know its contents and to assent to them.¹³

3. Mistake of law.

It is stated as a general rule of equity jurisprudence that relief will not be granted against a mistake of law.¹⁴ A mistake as to the legal effect of an instrument or of certain acts will not ordinarily furnish ground for equitable relief.¹⁵ But there are limitations to this doctrine. Where, on the one side, there is a mistake of law, and, on the other side, there is either positive fraud or inequitable, unfair or deceptive conduct which tends to confirm the mistake and conceal the truth, a court of equity will grant relief.¹⁶

C. Duress.

A transaction effected through the exercise of duress may be rescinded in an equitable action for that purpose.¹⁷ Duress is said to be a species of fraud in which compulsion

11. *Belknap v. Sealey*, 14 N. Y. 143.

12. *Harper v. Newburgh*, 159 App. Div. 695, 145 N. Y. Supp. 59.

13. *Metzger v. Aetna Ins. Co.*, 227 N. Y. 411.

14. *Berry v. American Central Ins. Co.*, 132 N. Y. 49.

15. *Berenboick v. St. Luke's Hospital*, 23 App. Div. 339, 48 N. Y. Supp. 363, appeal dismissed, 155 N. Y. 655; *Montgomery v. Ellis*, 6 How. Pr. 326. See also, *Ludlam v. Ludlam*, 194 App.

Div. 411, 185 N. Y. Supp. 343, affirmed, 232 N. Y. 615.

16. *Berry v. American Central Ins. Co.*, 132 N. Y. 49; *Haviland v. Willetts*, 141 N. Y. 35.

17. *Schoener v. Lissauer*, 107 N. Y. 111; *Meaney v. Meaney*, 213 App. Div. 756, 210 N. Y. Supp. 105, affirmed, 243 N. Y. 566; *American District Tel. Co. v. City of New York*, 213 App. Div. 578, 211 N. Y. Supp. 262; *Ring v. Ring*, 127 App. Div. 411, 111 N. Y.

in some form takes the place of deception in accomplishing the injury.¹⁸ The mere fact that the results of the duress are in the form of a compromise does not take the case beyond the reach of equitable interference.¹⁹ Thus, if property is extorted or if an advantage is gained through a threat of criminal prosecution of the husband or wife or a child of a party, the transaction may be rescinded in an equitable action for that purpose.²⁰ In such a case, it is of no consequence whether the threat is of a lawful or unlawful imprisonment.²¹ Inasmuch as equity will rescind a transaction for undue influence,²² it is not necessary to draw a distinction between duress and undue influence in such cases.²³ The principle which appears to underlie this class of cases is, that whenever a party is so situated as to exercise a controlling influence over the will, conduct and interest of another, contracts thus made will be set aside.²⁴

Formerly duress could only be predicated upon acts or threats which affected the person, but now it is recognized that duress may arise out of acts which affect property rights.²⁵ Thus, duress may be accomplished by the filing of an unauthorized mechanic's lien.²⁶ A telegraph company having a statutory right to the use of city streets for its

Supp. 713, affirmed without opinion, 199 N. Y. 574.

18. *Aronoff v. Levine*, 190 App. Div. 172, 179 N. Y. Supp. 247, affirmed, 232 N. Y. 529.

19. *Aronoff v. Levine*, 190 App. Div. 172, 179 N. Y. Supp. 247, affirmed, 232 N. Y. 529.

20. *Schoener v. Lissauer*, 107 N. Y. 111; *Adams v. Irving Nat. Bank*, 116 N. Y. 606. See also, *Smith v. Rowley*, 66 Barb. 502.

Agreement not procured by prosecution.—In a suit to set aside a deed and separation agreement on the ground of fraud and duress in which it appeared that the defendant caused the plaintiff to be arrested for assault and he was indicted for assault in the second degree and pleaded guilty to assault in the third degree, receiving a suspended sentence, evidence examined, and held, that the plaintiff's arrest and holding for the grand jury were

not for an unlawful or improper purpose and that the plaintiff in executing the instruments acted of his own free will and not as the result of constraint or coercion, and also that at the time of the execution of the separation agreement the defendant had a good cause of action against the plaintiff herein. *Fowler v. Fowler*, 197 App. Div. 572, 188 N. Y. Supp. 529.

21. *Adams v. Irving Nat. Bank*, 116 N. Y. 606.

22. See the following paragraph.

23. *Adams v. Irving Nat. Bank*, 116 N. Y. 606.

24. *Adams v. Irving Nat. Bank*, 116 N. Y. 606.

25. *Aronoff v. Levine*, 105 Misc. 668, 173 N. Y. Supp. 830, modified, 179 N. Y. Supp. 247.

26. *Aronoff v. Levine*, 190 App. Div. 172, 179 N. Y. Supp. 247, affirmed, 232 N. Y. 529.

lines may maintain an action to rescind a franchise agreement with the city, where the agreement was impelled by an ordinance of the city to the effect that if the company desired to continue its business in the city, it must secure a franchise.²⁷

But a contract may not be cancelled for duress because of a threat to one of the parties, which it is not claimed could or would have injured him.²⁸ And a threat to pursue a legal remedy or to exercise a legal right cannot be made the basis of the action.²⁹ Thus, a transaction will not be avoided because it was effected by a threat to file a petition in voluntary bankruptcy and to give false testimony in the proceeding.³⁰ But, if a husband claims to have evidence of the infidelity of his wife, and secures a conveyance of her property to him through a threat to use such evidence, the conveyance may be cancelled.³¹

Where a wife procured from her husband a deed of a house and lot under the threat that if he did not deed it to her she would leave him, but promising if he did she would remain with him, be a wife to him, rear their child and they would always have a home, with the fraudulent intent of continuing to live with him only as long as she liked and then to break up the home and keep the property as her own, she becomes a trustee *ex maleficio*, and upon the betrayal of the confidence which the husband has placed in her, he is entitled to a reconveyance of the property. It is not necessary that a strict case of duress should be established in order to set aside a deed procured under such circumstances.³²

D. Undue influence.

A conveyance or other contract may be set aside if it was procured through undue influence.³³ Undue influence is said

27. *American District Teleg. Co. v. City of New York*, 213 App. Div. 578, 211 N. Y. Supp. 262.

28. *Kalbfleisch v. Anderson*, 116 Misc. 361, 190 N. Y. Supp. 18.

29. *Lawrence v. Morris*, 167 App. Div. 186, 152 N. Y. Supp. 777; *Kalbfleisch v. Anderson*, 116 Misc. 361, 190 N. Y. Supp. 18.

30. *Kalbfleisch v. Anderson*, 116 Misc. 361, 190 N. Y. Supp. 18.

31. *Meaney v. Meaney*, 213 App. Div. 756, 210 N. Y. Supp. 105, affirmed without opinion, 243 N. Y. 566.

32. *Faulkner v. Faulkner*, 162 App. Div. 848, 147 N. Y. Supp. 745.

33. *Sears v. Shafer*, 6 N. Y. 268; *Adams v. Irving Nat. Bank*, 116 N. Y. 606; *Disbrow v. Disbrow*, 31 App. Div. 624, 52 N. Y. Supp. 471, affirmed, 164 N. Y. 564; *Mullin v. Mullin*, 119 App. Div. 521, 104 N. Y. Supp. 323; *Adams*

to be a species of fraud.³⁴ It contemplates that the person upon whom it is exercised shall be compelled to do a certain thing against his will; that by overpersuasion amounting in law to coercion of the will, the party shall be brought to do that which he would not otherwise have done.³⁵ The principle is clear; the difficulty is in determining whether the allegation of undue influence has been so satisfactorily proved that the relief will be granted. Under some circumstances when a confidential relation exists between the parties and the stronger has secured a conveyance or advantage from the weaker, a presumption of undue influence is entertained, placing a burden of explanation on the one benefiting from the transaction.³⁶ Duress is sometimes said to be a form of undue influence, and a transaction may be annulled on that theory.³⁷ Under other circumstances, the question of undue influence is one of fact depending upon the facts surrounding the particular case. The circumstances to be considered are the relations between the parties, the nature of the transaction, the opportunities for the exercise of influence, the physical and mental powers of resistance on the part of the person said to have been influenced, and the strength of the personality of the other party. In those cases where no confidential relations exist between the parties, there is no presumption of undue influence, and it must be proved.³⁸

E. Transaction between persons in confidential relations.

1. In general.

As a general rule, the burden of establishing fraud or undue influence rests upon the party alleging it as a ground

v. Luce, 181 App. Div. 232, 170 N. Y. Supp. 172; First Nat. Bank v. Wright, 207 App. Div. 521, 202 N. Y. Supp. 774; Eckerson v. Eckerson, 102 Misc. 422, 169 N. Y. Supp. 933; Bronx County Trust Co. v. O'Connor, 132 Misc. 294, 230 N. Y. Supp. 226; Brice v. Brice, 5 Barb. 533; Whelan v. Whelan, 3 Cow. 537; Platt v. Platt, 2 T. & C. 25, affirmed, 58 N. Y. 46; Wager v. Reid, 3 T. & C. 332.

34. Absalon v. Sickinger, 102 App. Div. 383, 92 N. Y. Supp. 601.

35. Absalon v. Sickinger, 102 App. Div. 383, 92 N. Y. Supp. 601.

36. See the following paragraph.

37. See, supra, II-C, Duress.

38. Davin v. Isman, 228 N. Y. 1; Absalon v. Sickinger, 102 App. Div. 383, 92 N. Y. Supp. 601; Donlon v. Donlon, 154 App. Div. 212, 138 N. Y. Supp. 1039; Cooper v. Moore, 55 Misc. 102, 104 N. Y. Supp. 1049, affirmed, 124 App. Div. 911, 108 N. Y. Supp. 1128; Hasbrouck v. Young, 15 N. Y. Supp. 919, 40 St. Rep. 766.

for defeating a contract. But to this general rule there is a well established exception. Whenever the relations between the parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side from superior knowledge of the matter derived from a fiduciary relation, or from overmastering influence, or on the other hand from weakness, dependence or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood.³⁹ Although no actual or positive fraud is shown, relief may be granted on the ground of constructive fraud.⁴⁰ The rule is not limited to cases of attorney and client, guardian and ward, trustee and *cestui que trust*, or other similar relations, but it holds good wherever fiduciary relations exist and there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding.⁴¹ A deed may be set aside where it was signed by a woman who

39. *Boyd v. De La Montagnie*, 73 N. Y. 498; *Dambmann v. Schulting*, 75 N. Y. 55; *Cowee v. Cornell*, 75 N. Y. 91; *Disbrow v. Disbrow*, 31 App. Div. 624, 52 N. Y. Supp. 471, affirmed, 164 N. Y. 564; *Absalon v. Sickinger*, 102 App. Div. 383, 92 N. Y. Supp. 601; *Hunter v. McCammon*, 119 App. Div. 326, 104 N. Y. Supp. 402; *Gugel v. Hiscox*, 138 App. Div. 61, 122 N. Y. Supp. 557, reversed on other grounds, 216 N. Y. 145; *Dunn v. Dunn*, 151 App. Div. 800, 136 N. Y. Supp. 282; *Lange v. Lange*, 185 App. Div. 259, 172 N. Y. Supp. 846; *First Nat. Bank v. Wright*, 207 App. Div. 521, 202 N. Y. Supp. 774; *Smith v. Howlett*, 21 Misc. 386, 47 N. Y. Supp. 1002; *Reilly v. Frias*, 85 Misc. 162, 147 N. Y. Supp. 84; *Eckerson v. Eckerson*, 102 Misc. 422, 169 N. Y. Supp. 933; *Kelly v. Kelly*, 116 Misc. 195, 186 N. Y. Supp. 436; *Bronx County Trust Co. v. O'Connor*, 132 Misc. 294, 230 N. Y. Supp. 226; *Carpenter v. Mosher*, 9 N. Y. Supp. 397,

32 St. Rep. 82, modified on other grounds, 125 N. Y. 736; *Valentine v. Richardt*, 13 N. Y. Supp. 417, 35 N. Y. St. Rep. 641, affirmed, 126 N. Y. 272; *Platt v. Platt*, 2 T. & C. 25, affirmed, 58 N. Y. 46. "A court of equity interposes its benign jurisdiction to set aside instruments executed between persons standing in the relations of parent and child, guardian and ward, physician and patient, solicitor and client, and in various other relations, in which one party is so situated as to exercise a controlling influence over the will and conduct and interests of another. In some cases undue influence will be inferred from the nature of the transactions alone; in others, from the nature of the transaction, and the exercise of occasional, or habitual, influence." *Sears v. Shafer*, 6 N. Y. 268.

40. *Kelly v. Kelly*, 116 Misc. 195, 186 N. Y. Supp. 436.

41. *Yedlin v. Rubin*, 219 App. Div.

claims that she did not intend to execute a deed, and it appears that the deed was without adequate consideration, and the negotiations were conducted, on the one side by one of the defendants who was an experienced real estate broker, acting under the advice of his attorney, and on the other side by the woman and her father, an old man, with little business experience, who were advised by and relied on her husband, who was unworthy of trust and who received a commission on the transaction.⁴²

Contracts by which the decedent, a feeble, decrepit and lonely old man suffering from a progressive disease which gradually rendered him more feeble and helpless, weak and infirm in mind and body, paid large sums of money for an annuity during his life to one in whom he reposed great confidence and who had been his close friend and confidential adviser and who was a bright and energetic business man possessed of more than ordinary ability, where the contracts were unfair and unconscionable in view of the decedent's condition, should be set aside notwithstanding the fact that about the same time the contracts were made, decedent executed a will which was admitted to probate and by which he made a just disposal of his property.⁴³

2. Attorney and client.

Where an attorney seeks to enforce an agreement obtained from a client which the latter seeks to have cancelled and set aside, the burden is upon the attorney to show that a reasonable use has been made of the confidence reposed in him by his client, who is not required to show actual fraud to obtain relief. The relation between the parties imposes the burden on the attorney to show that the transaction is just and fair, and that he has derived no unfair advantage from his fiduciary relation.⁴⁴

3. Physician and patient.

The relation of physician and patient does not ordinarily import a confidential relation as to business matters, yet the

694, 220 N. Y. Supp. 545; *Reilly v. Frias*, 85 Misc. 162, 147 N. Y. Supp. 84; *Wager v. Reid*, 3 T. & C. 332.

⁴². *Quinby v. Clock*, 60 N. Y. Supp. 253.

⁴³. *Barnes v. Waterman*, 54 Misc.

392, 104 N. Y. Supp. 685, affirmed, 129 App. Div. 929, 114 N. Y. Supp. 1118.

⁴⁴. *Reilly v. Frias*, 85 Misc. 162, 147 N. Y. Supp. 84.

circumstances of a particular case may bring into effect the general rule relating to confidential relations, and hence place upon the physician the burden of showing the fairness of the transaction.⁴⁵

4. Trustee and *cestui que trust*.

The relation between a trustee and the beneficiary of the trust is one of confidence, and equity will not countenance a betrayal. If the trustee in his dealings with the *cestui que trust* has derived any advantage, the transaction will be rescinded unless the trustee shows that the transaction was fair and properly secured.⁴⁶ The trustee must show that the beneficiary entered into the transaction intelligently.⁴⁷ Equity may decree the cancellation of a transfer of a part of the trust estate made by a beneficiary to the trustee.⁴⁸ A trustee cannot deal with the trust estate to his own benefit without the knowledge and consent of the beneficiary; and this rule applies where one of the beneficiaries is also one of the trustees and secures a transfer of the trust estate to himself.⁴⁹ If the trustee settles with the beneficiary by giving him a worthless or a depreciated security, equity may rescind the transaction.⁵⁰

Where a creditor and stockholder of a corporation delivered his stock to the president thereof upon the latter's agreement to transfer the stock to a third person for the purpose of inducing such third person to come to the rescue of the corporation by sustaining its credit, but the president diverts the stock to his own use, the transaction may be rescinded.⁵¹

A sale to a corporation, made by one of its directors, of the stock of another corporation, will be rescinded, where it appears that the seller failed to make the transaction known to his co-directors for more than a year after the sale, as

45. *Wager v. Reid*, 3 T. & C. 332; *Valentine v. Richardt*, 13 N. Y. Supp. 417, 35 N. Y. St. Rep. 641, affirmed, 126 N. Y. 272.

46. *Gugel v. Hiscox*, 138 App. Div. 61, 122 N. Y. Supp. 557, reversed on other grounds, 216 N. Y. 145; *Smith v. Howlett*, 21 Misc. 386, 47 N. Y. Supp. 1002.

47. *Smith v. Howlett*, 21 Misc. 386, 47 N. Y. Supp. 1002.

48. *Gugel v. Hiscox*, 138 App. Div. 61, 122 N. Y. Supp. 557, reversed on other grounds, 216 N. Y. 145.

49. *Tiffany v. Clark*, 58 N. Y. 632.

50. *Smith v. Howlett*, 21 Misc. 386, 47 N. Y. Supp. 1002.

51. *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931.

such conduct is not consistent with his fiduciary relation to the corporation.⁵²

5. Promoters and stockholders.

A promoter of a corporation who makes a personal profit out of the transaction must inform his fellow subscribers thereof in order to be able to retain it. The burden may be upon him of showing that he has taken no advantage of his fellow subscribers.⁵³ Where the owners of a plant promote the organization of a corporation so that they can dispose of the plant to it and make a secret arrangement with some of the directors thereof for the division of the difference between the actual value of the property and the purchase price, the corporation, upon discovery of the situation, may rescind the sale.⁵⁴

6. Partners.

Equity will scrutinize agreements between partners closely and watchfully, and will not permit them to stand, if it can discover that they were brought about by concealment, unfairness or other unconscionable conduct.⁵⁵ If there exists a kinship between the partners, or if one is in feeble physical condition and the other is the dominating personality of the partnership, the circumstances may call upon the latter to show the propriety of a transaction between them.⁵⁶

7. Co-tenants.

Ordinarily, co-tenants stand upon an equal footing. But, where a lunatic and his uncle and aunt are co-tenants of a number of parcels of real estate, and the committee of the lunatic, who has no knowledge in respect to the condition of the real estate, at the suggestion of the uncle and aunt, obtains leave of the court to join in a voluntary partition of such real estate, the uncle and aunt, in their dealings

52. *Norwegian-American Securities Co. v. Schenstrom*, 124 Misc. 235, 207 N. Y. Supp. 163. 152 App. Div. 391, 136 N. Y. Supp. 914, modified, 208 N. Y. 607.

53. *Hyde Park Terrace Co. v. Jackson Bros. Realty Co.*, 161 App. Div. 699, 146 N. Y. Supp. 1037; *Colton Imp. Co. v. Richter*, 26 Misc. 26, 55 N. Y. Supp. 486.

54. *Finck v. Canadaway Fertilizer*

55. *Hasberg v. McCarty*, 13 Daly 415, affirmed, 14 Daly 414; *Platt v. Platt*, 2 T. & C. 25, affirmed, 58 N. Y. 46.

56. *Platt v. Platt*, 2 T. & C. 25, affirmed, 58 N. Y. 46.

with the committee of the lunatic, are bound to exercise the utmost good faith. Where the uncle and aunt, by means of false representations and fraudulent concealment in respect to the condition of the real estate induce the committee of the lunatic to accept as the lunatic's share of the real estate, property, the title of which is in dispute and the value of which is much less than the value of the property set apart for the uncle and aunt, the lunatic's heirs may, after his death, maintain an action to set aside the partition.⁵⁷

8. Husband and wife.

Although the relation of husband and wife is confidential, it is not regarded, so far as the proposition now under consideration is concerned, in the same class as the relation of trustee and beneficiary. In a transaction between them, there is no presumption of undue influence or fraud arising merely from the relationship, and the burden is not upon the husband to show that her deed to him was a voluntary act and clearly understood by her.⁵⁸ On the other hand, transactions between them are not considered as are transactions between strangers. If the normal relation of confidence is betrayed, the courts will not hesitate to set aside the transaction.⁵⁹

A separation agreement entered into while the parties are living together as husband and wife is void under section 51 of the Domestic Relations Law;⁶⁰ but an agreement made between the parties while they are living in a state of separation may, in a proper case, be sustained.⁶¹ But a court of equity will not uphold the agreement unless it is fair and affords adequate support for the wife.⁶² Other grounds for rescission may also be urged, as ill-treatment, duress, fraud

57. *McNally v. Fitzsimmons*, 70 App. Div. 179, 75 N. Y. Supp. 331.

58. *Donlon v. Donlon*, 154 App. Div. 212, 138 N. Y. Supp. 1039. See also, *Boyd v. De La Montagnie*, 73 N. Y. 498, containing some statements in the opinion which might indicate a different rule than is stated in the text.

59. *Boyd v. De La Montagnie*, 73 N. Y. 498.

60. *Tirrell v. Tirrell*, 107 Misc. 179, 177 N. Y. Supp. 357; *Stewart v. Stewart*, 130 Misc. 59, 223 N. Y. Supp. 603.

61. *Glusker v. Glusker*, 108 Misc. 287, 177 N. Y. Supp. 582; *Leith v. Leith*, 124 Misc. 24, 206 N. Y. Supp. 687.

62. *Hungerford v. Hungerford*, 161 N. Y. 550; *Tirrell v. Tirrell*, 232 N. Y. 224, reversing, 190 App. Div. 463, 180 N. Y. Supp. 49; *Tirrell v. Tirrell*, 107 Misc. 179, 177 N. Y. Supp. 357; *Glusker v. Glusker*, 108 Misc. 287, 177 N. Y. Supp. 582; *Brown v. Brown*, 122 Misc. 714, 203 N. Y. Supp. 793, reversed, 209 App. Div. 335, 204 N. Y.

or undue influence.⁶³ If the agreement does not measure up to this standard, it may be cancelled by a court of equity,⁶⁴ upon her restoring to the husband such part of the consideration as she has not already expended for her support.⁶⁵ The fact that the purpose of the wife in seeking a rescission of the separation agreement is that she may receive an allowance of alimony in an action of divorce, is no objection to the rescission.⁶⁶ An agreement of this nature may be rescinded even after an absolute divorce between the parties.⁶⁷

9. Parent and child.

It is recognized by the courts that property transactions between a parent and child are normally prompted by the affection between the parties. Hence, the mere relation cannot provide an inference that a transaction was the result of fraud or undue influence.⁶⁸ More than the mere relationship is to be shown in order to justify a rescission.⁶⁹ If the child is inexperienced, and under the control of the parent, and the parent secures an advantage of the child, then the circumstances may justify a finding of fraud or undue influence, and place upon the parent the burden of showing that the transaction was fair and was accepted by the child intelligently. A failure of a parent to advise a child of his legal rights may constitute a fraud.⁷⁰ On the other hand, in the later years of the parent, with the coming of physical and mental weakness, and a growing dependence upon a child, if the latter, with a vigorous and dominating nature, secures a transfer of the property of the parent, there may arise a presumption that the transfer was accomplished by

Supp. 896, affirmed, 239 N. Y. 518; *Stewart v. Stewart*, 130 Misc. 59, 223 N. Y. Supp. 603.

63. *Pelz v. Pelz*, 156 App. Div. 765, 142 N. Y. Supp. 54.

64. *Hungerford v. Hungerford*, 161 N. Y. 550; *Tirrell v. Tirrell*, 232 N. Y. 224, reversing, 190 App. Div. 463, 180 N. Y. Supp. 49; *Stewart v. Stewart*, 130 Misc. 59, 223 N. Y. Supp. 603; *Montgomery v. Montgomery*, 170 N. Y. Supp. 867.

65. *Hungerford v. Hungerford*, 161 N. Y. 550; *Montgomery v. Montgomery*, 170 N. Y. Supp. 867. And see,

supra, I-F-5, Restoration of benefits received by plaintiff—separation agreements.

66. *Pelz v. Pelz*, 156 App. Div. 765, 142 N. Y. Supp. 54.

67. *Hamlin v. Hamlin*, 224 App. Div. 168, 230 N. Y. Supp. 51.

68. *Cooper v. Moore*, 55 Misc. 102, 104 N. Y. Supp. 1049, affirmed, 124 App. Div. 911, 108 N. Y. Supp. 1128.

69. *Cooper v. Moore*, 55 Misc. 102, 104 N. Y. Supp. 1049, affirmed 124 App. Div. 911, 108 N. Y. Supp. 1128.

70. *Collins v. McKenna*, 116 Misc. 72, 189 N. Y. Supp. 433.

fraud and undue influence.⁷¹ The burden may then be placed on the child of showing that the parent fully understood and comprehended the nature of the transaction.⁷²

10. Collateral relatives.

The court can indulge no presumption of fraud or undue influence merely because the relation of the parties was that of brothers, or of uncle and nephew, or similar relationship.⁷³ But, in a particular case, a confidential relation may exist, as where they do not deal on terms of equality, but one of the parties is dominant and the other is weak, physically or mentally, or relies on the stronger party.⁷⁴ When such a situation is shown to exist, and the stronger mind has secured an advantage from the weaker, apparently in violation of the confidential relation between the parties, the transaction will not be sustained unless its propriety is shown.⁷⁵

F. Incompetency.

Where a person, pursuant to law, is duly adjudged insane or otherwise incompetent and a committee has been appointed, the world is chargeable with notice and every contract thereafter made with him is absolutely void; but contracts made by an incompetent person before such an adjudication and appointment are voidable only, at his election on recovering from the disability or at the election of his committee or personal representatives or heirs, and on such election being made, an action in equity may be brought for the restoration of his property.⁷⁶ If the contract is fair

71. *Lange v. Lange*, 185 App. Div. 259, 172 N. Y. Supp. 846; *Eckerson v. Eckerson*, 102 Misc. 422, 169 N. Y. Supp. 933. See also, *Whelan v. Whelan*, 3 Cow. 537.

72. *Hunter v. McCammon*, 119 App. Div. 326, 104 N. Y. Supp. 402; *Dunn v. Dunn*, 151 App. Div. 800, 136 N. Y. Supp. 232; *Lange v. Lange*, 185 App. Div. 259, 172 N. Y. Supp. 846.

73. *Spicer v. Spicer*, 22 Jones & S. (54 Super. Ct.) 230; *Mitchell v. Mitchell*, 5 Week. Dig. 449.

74. *Absalon v. Sickinger*, 102 App. Div. 383, 92 N. Y. Supp. 601; *First*

Nat. Bank v. Wright, 207 App. Div. 521, 202 N. Y. Supp. 774; *Kelly v. Kelly*, 116 Misc. 95, 186 N. Y. Supp. 436.

75. *Sears v. Shafer*, 6 N. Y. 268; *First Nat. Bank v. Wright*, 207 App. Div. 521, 202 N. Y. Supp. 774; *Kelly v. Kelly*, 116 Misc. 195, 186 N. Y. Supp. 436; *Platt v. Platt*, 2 T. & C. 25, affirmed, 58 N. Y. 46. See also, *McNally v. Fitzsimmons*, 70 App. Div. 179, 75 N. Y. Supp. 331.

76. *Riggs v. American Tract Soc.*, 84 N. Y. 330; *Booth v. Fuller*, 35 App. Div. 117, 64 N. Y. Supp. 670; *Sterling*

and for the benefit of the incompetent, and was made in good faith and without notice of the incompetency, and the other party cannot be placed *in statu quo*, these facts may constitute an equitable defense to an action for rescission.⁷⁷ Such a situation is to be alleged and proved by the party defending the transaction.⁷⁸

A contract made by a person of weak mind, although he is not so incompetent that the court would be justified in appointing a committee of his property, may be rescinded, where, in addition to the want of intelligence, it appears that an unconscionable advantage has been taken of him.⁷⁹

Intoxication may deprive one of his reason to such an extent that a contract made by him while in such condition may be rescinded.⁸⁰ An agreement obtained from an intoxicated person, if the intoxication was produced by procurement or contrivance of the person obtaining the agreement, will be set aside as fraudulently obtained.⁸¹ Where a person has parted with the possession of property through an imposition practiced upon him when intoxicated, he cannot be expected to give a precise statement of the transaction, and should not on that account be denied redress.⁸²

Incompetency may present a question of fact for the trial

v. Sterling, 98 App. Div. 426, 90 N. Y. Supp. 306; Lawrence v. Morris, 167 App. Div. 186, 152 N. Y. Supp. 777; Adams v. Luce, 181 App. Div. 232, 170 N. Y. Supp. 172; McCarthy v. Bowling Green Storage & Van Co., 182 App. Div. 18, 169 N. Y. Supp. 463; Von Meyer v. Varcoe, 106 Misc. 426, 175 N. Y. Supp. 826; Hasbrouck v. Young, 15 N. Y. Supp. 919, 40 St. Rep. 766; Aitkens v. Roberts, 164 N. Y. Supp. 502.

Dower of wife of incompetent.—Where a deed, executed by husband and wife, is set aside because of the husband's unsoundness of mind, no deductions can be made on account of the value of the wife's right of dower, nor for taxes and assessments paid since the execution of the deed. Such a deed passes nothing; and the wife could not convey her inchoate right of dower. She could only release it to

some one having the legal estate in the land. A deed being void, the heir of the grantor may recover the land attempted to be conveyed. And the court, in declaring such deed void in law, cannot impose, as a condition, that it shall be treated as good, so far as to require the plaintiff to repay what has been paid, by the occupant, for taxes and assessments. Marvin v. Lewis, 61 Barb. 49.

77. McCarthy v. Bowling Green Storage & Van Co., 182 App. Div. 18, 169 N. Y. Supp. 463.

78. Riggs v. American Tract Soc., 84 N. Y. 330.

79. Sprague v. Duel, 11 Paige 480.

80. Prentice v. Achorn, 2 Paige 30. See also, Pritz v. Jones, 117 App. Div. 643, 102 N. Y. Supp. 549.

81. Hutchinson v. Brown, Clarke 408.

82. Brinkeroff v. Perry, 12 Week. Dig. 459.

justice,⁸³ whose finding, if reasonably sustained by the evidence, will not be disturbed by an appellate court. A condition of mental incompetency having been shown to exist at a particular time, such incompetency is presumed to continue.⁸⁴ Or, to state the principle in other words, if the party attacking the contract shows the general incompetency of a party thereto, a burden is on the opposing party to show that the contract was made during a lucid interval.⁸⁵

G. Infancy.

Subject to certain limitations a contract made by an infant is voidable, and an action may be maintained to rescind the transaction.⁸⁶ The infant, upon arriving at his majority may affirm the contract; or, at his election he may disaffirm it. If he disaffirms and brings suit for rescission, he must return what he has received so far as it is still in his power to do so; but relief will not be denied because he cannot place the other party *in statu quo*.⁸⁷

H. Breach of contract.

1. In general.

Ordinarily, a mere breach of contract does not afford a sufficient ground for a rescission thereof,⁸⁸ for an action at law for damages affords an adequate remedy in such a case.⁸⁹ Yet it is recognized that there are limitations to the general rule. If the remedy at law is inadequate a court of equity is tempted to assume jurisdiction of the controversy.⁹⁰ The failure to perform a contract, coupled with an intention at the time of its execution not to perform, may constitute a fraud and justify a rescission on that ground.⁹¹

83. *Riggs v. American Tract Soc.*, 84 N. Y. 330; *Hasbrouck v. Young*, 15 N. Y. Supp. 919, 40 St. Rep. 766.

84. *Von Meyer v. Varcoe*, 106 Misc. 426, 175 N. Y. Supp. 826.

85. *Aitkens v. Roberts*, 164 N. Y. Supp. 502.

86. *O'Donohue v. Smith*, 130 App. Div. 214, 114 N. Y. Supp. 536.

87. *McCarthy v. Bowling Green Storage & Van Co.*, 182 App. Div. 18, 169 N. Y. Supp. 463; *Wyatt v. Lortscher*, 217 App. Div. 224, 216 N. Y. Supp. 571.

88. *Smith v. Johannsen*, 199 App.

Div. 823, 192 N. Y. Supp. 478; *Interstate Chemical Corp. v. Duke*, 92 Misc. 519, 156 N. Y. Supp. 244, affirmed, 176 App. Div. 684, 163 N. Y. Supp. 1035.

89. *Smith v. Johannsen*, 199 App. Div. 823, 192 N. Y. Supp. 478.

90. *Giarratano v. McIlwain*, 215 App. Div. 644, 214 N. Y. Supp. 582; *De Mille Co. v. Casey*, 115 Misc. 646, 189 N. Y. Supp. 275; *De Mille Co. v. Casey*, 121 Misc. 78, 201 N. Y. Supp. 20; *Michael v. Hallheimer*, 56 Hun 416.

91. See, *supra*, II-A-8, Fraud—Statements of Future Events.

A breach of a contract which goes to the root thereof and renders nugatory the intention of the parties, may authorize a rescission of the agreement.⁹² The remedy may be available where one party repudiates the contract but retains the benefits secured thereby.⁹³ Rescission may not be had where the default is in respect to a contract provision which is merely subsidiary, and which does not go to the entire consideration.⁹⁴ The rescission of a contract is not permitted for a slight, casual or technical breach thereof, but, as a general rule, only for such as are material and wilful, or, if not wilful, so substantial and fundamental as strongly to tend to defeat the object of the parties in the making of the contract. Failure to perform in every respect is not essential, but a failure which leaves the subject of the contract substantially different from what was contracted for is sufficient. If the party who seeks rescission has an adequate remedy at law, ordinarily he is not entitled to rescind, but in cases of repudiation, or of a breach going to the root of the contract, unless the damages can be ascertained with reasonable certainty, rescission is a matter of right, with restitution instead of compensation.⁹⁵ If the party breaching the contract has by virtue of the contract property in his hands belonging to the other party, additional reason is thereby furnished for equitable relief.⁹⁶ Where

92. *De Mille Co. v. Casey*, 121 Misc. 78, 201 N. Y. Supp. 20.

Renewal privilege in lease.—A suit in equity does not lie to rescind and cancel a renewal privilege contained in a recorded lease upon the ground that such privilege constitutes a cloud upon the title because the lessee has not performed conditions precedent to the right of renewal, where the suit is brought before the term of the original lease has expired and no attempt is made to rescind the original lease. *Elkhorn Valley Coal-Land Co. v. Empire Coal & Coke Co.*, 191 App. Div. 230, 181 N. Y. Supp. 132.

93. *Schneider v. Miller*, 129 App. Div. 197, 113 N. Y. Supp. 399; *Bolen v. Bolen*, 44 Hun 362.

94. *Rosenwasser v. Blyn Shoes, Inc.*, 246 N. Y. 340.

95. *Callanan v. Keeseville, etc., R. Co.*, 199 N. Y. 268; *Raftery v. World Film Corp.*, 180 App. Div. 475, 167 N. Y. Supp. 1027.

96. "Of course, because a plaintiff may have the right to terminate the particular contract, it does not necessarily follow that he may come into a court of equity for a decree of cancellation. His rights may be such as are solely cognizable in a court of law, where a judgment for damages will afford complete compensation and relief for any injury he has suffered. Such is the case arising from the breach of an ordinary contract for the sale and delivery of goods in installments. But in a case like the present, where the contract confers upon the defendant the privilege to use and enjoy a property right belonging to

one having a lease of mining lands agreed to assign the lease with other property to a corporation to be organized by the defendant, and the latter agreed that after the organization of the corporation and the assignment of the lease, he would contribute a certain sum of money as capital for the purpose of carrying on the business, but he refused to advance the capital, it was held that the assignment of the lease could be cancelled.⁹⁷

But it is only when the parties can be placed *in statu quo* that one may rescind a contract for the failure of the other to perform it.⁹⁸ The mere failure of one of the contracting parties to pay to the other a sum due on the contract, the contract having been otherwise fully performed, is not sufficient to warrant a rescission.⁹⁹ The failure to perform a stipulation contained in a contract for the conveyance of property when the act is not to precede the conveyance itself cannot be relied upon as a condition to annul the conveyance.¹

2. Oral stipulation not included in written agreement.

Where a contract is in writing, the rights and duties of the parties depend upon the terms or legal intendment of the paper itself, as it is conclusively presumed that the whole engagement is embraced therein. The rule is the same at equity as at common law; and, in the absence of proof of fraud or mistake, the contract cannot be controlled by evidence that it was executed on the faith of a contemporaneous or preceding oral stipulation not embraced in it; nor can it be set aside on the ground that such oral stipulation has not been performed.² Thus, a deed will not be rescinded on the

the plaintiff, which privilege the defendant continues to enjoy and to make use of to the plaintiff's injury, notwithstanding his (defendant's) material breach of the contract, plaintiff invokes but an elementary principle of equity jurisdiction when he seeks a decree to establish his rights. In such a case plaintiff may or may not, before he commences his action, have given defendant notice of his election to terminate. But if such a notice has been given and, as here, defendant has ignored the notice, reason and justice require that plaintiff be given a decree that will make

effective the termination which was theoretically accomplished by the notice." *De Mille Co. v. Casey*, 115 Misc. 646, 189 N. Y. Supp. 275.

97. *Schneider v. Miller*, 129 App. Div. 197, 113 N. Y. Supp. 399.

98. *Scheibe v. Zaro*, 199 App. Div. 807, 192 N. Y. Supp. 433. And see, *supra*, I-F, Restoration of Benefits Received by Plaintiff.

99. *Smith v. Johannsen*, 199 App. Div. 823, 192 N. Y. Supp. 478.

1. *DeKay v. Bliss*, 4 St. Rep. 728, affirmed, 120 N. Y. 91.

2. *Wilson v. Deen*, 74 N. Y. 531, wherein it was said: "Both at law and

ground that there was a parol agreement, as a part of the consideration for the conveyance, that the grantee should furnish support for the grantor, and that such agreement had not been performed.³ But the omission from the deed of a clause relating to the support of the grantor, when such was the agreement between the parties, may be evidence of fraud, which with the other evidence in the case may justify a cancellation on the deed on that ground.⁴

3. Contracts for support of grantor.

A conveyance of property, the consideration of which is the promise of the grantee to support the grantor, may be rescinded if the grantee fails to perform his promise.⁵ The grantor cannot maintain an action for the rescission of the deed, when he does not offer to return the benefits received under it and does not allege fraud or mutual mistake in its execution.⁶ If a deed of premises provides for the support of the grantor and gives him a lien on the premises for that purpose, the provision for the lien negatives a reservation of the right to rescind the conveyance for a failure of the grantee to furnish the support.⁷ The court will, however, determine the amount of the lien and enforce it.⁸ Even though the deed does not provide for the lien on the premises, the courts may declare a lien for that purpose.⁹

in equity, one who sets his hand and seal to a written instrument, knowing its contents, cannot be permitted to set up that he did so in reliance upon some verbal stipulation, made at the time, relating to the same subject, and qualifying or varying the instrument which he thus signs. The very purpose of the rule which excludes evidence of such declarations, is to avoid the uncertainties attendant upon such evidence, and equity will not set aside that important and well settled rule for the purpose of relieving a party against a risk, which, upon his own showing, if it be true, he has voluntarily incurred. It is only when through fraud or mistake a party has executed an instrument which he believes to be in accordance with the

real agreement, but which is, in fact, different, that equity will relieve; and even then, the mistake, as well as the agreement, must be made out by clear proof.

3. *Herrick v. Starkweather*, 54 Hun 532, 8 N. Y. Supp. 145, 28 St. Rep. 145.

4. *Carpenter v. Mosher*, 9 N. Y. Supp. 897, 32 St. Rep. 82, modified on other grounds, 125 N. Y. 736.

5. *Dennerlein v. Martin*, 247 N. Y. 145.

6. *Stehle v. Stehle*, 39 App. Div. 440, 57 N. Y. Supp. 201.

7. *Kinney v. Kinney*, 221 N. Y. 133.

8. *Kinney v. Kinney*, 221 N. Y. 133.

9. *Stehle v. Stehle*, 39 App. Div. 440, 57 N. Y. Supp. 201.

I. Want of consideration.

That a contract was executed without consideration is a defense which can ordinarily be established in a court of law when enforcement of the contract is sought; and, hence, an action in equity to cancel the agreement cannot be maintained. But, if it appears that there is no adequate remedy at law, equitable jurisdiction may be invoked. Thus, a mortgage executed without consideration may constitute a cloud on the title, and an action may be maintained to remove the cloud.¹⁰ The fact that the oral evidence relating to the transaction may be lost before the mortgagee seeks to enforce his lien, affords an additional reason for equitable intervention.¹¹ If the invalidity of the mortgage appears upon its face, it is difficult to frame any reason for inducing a court of equity to act.¹² A deed, which was executed and placed in escrow in contemplation of an arrangement which was afterwards voluntarily abandoned, but which by mistake has been recorded, may be cancelled.¹³

A contract made upon consideration of marriage will be cancelled upon the annulment of the marriage for a cause which renders the marriage void *ab initio*.¹⁴ Thus, when a marriage is annulled for the physical incapacity of the husband, a mortgage given to him by the wife's parents as a consideration for the marriage will be cancelled.¹⁵ Or, if a marriage is void on the ground that one of the parties had a husband or wife living, conveyances made between them on the faith of the validity of their marriage may be cancelled.¹⁶

If the transaction has resulted in the delivery of personal property, although it was effected without consideration, it may be sustained on the theory that it was a gift.¹⁷ In the absence of other grounds for relief, a voluntary gift of per-

10. *Rapps v. Gottlieb*, 142 N. Y. 164; *Messiah Home v. Rogers*, 212 N. Y. 315; *Swartout v. Ranier*, 67 Hun 241, 22 N. Y. Supp. 198, 50 St. Rep. 814, affirmed, 143 N. Y. 499; *Hyman v. Friedman*, 18 N. Y. Supp. 446, 45 St. Rep. 636, affirmed on opinion below, 138 N. Y. 639.

11. *Swartout v. Ranier*, 67 Hun 241, 22 N. Y. Supp. 198, 50 St. Rep. 814, affirmed, 143 N. Y. 499.

12. *Swartout v. Ranier*, 67 Hun 241,

22 N. Y. Supp. 198, 50 St. Rep. 814, affirmed, 143 N. Y. 499.

13. *Russell v. Russell*, 50 Barb. 445.

14. *Rubin v. Joseph*, 215 App. Div. 91, 213 N. Y. Supp. 460.

15. *Rubin v. Joseph*, 215 App. Div. 91, 213 N. Y. Supp. 460.

16. *Faulkner v. Rudell*, 194 App. Div. 810, 185 N. Y. Supp. 706; *Butler v. Butler*, 93 Misc. 258, 157 N. Y. Supp. 188.

17. *Doucet v. Massachusetts Bond-*

sonal property, *inter vivos*, will not be rescinded by a court of equity.¹⁸ Inadequacy of consideration is no ground for rescission, unless, possibly, where the inadequacy is so gross as to be evidence of fraud.¹⁹

J. Inadequacy of consideration.

A court of equity will not interfere to rescind the written instrument of competent parties merely because the agreement is unfair or unreasonable.²⁰ The fact that the consideration for an agreement was inadequate does not justify a court of equity in cancelling the instrument.²¹ To this principle, however, an exception must be made where the parties were in confidential relations and the stronger mind has secured an advantage from the weaker.²² Moreover, if the inadequacy of consideration is so gross as to shock the conscience of the court, an inference of fraud may be drawn, and the transaction may be avoided on the ground of fraud.²³ In such a case, the contract is not rescinded for the reason that it was hard, but on the theory that the inequality forms a presumption of fraud.²⁴ Inequality, in order to amount to

ing Ins. Co., 180 App. Div. 599, 167 N. Y. Supp. 892.

18. *Doucet v. Massachusetts Bonding Ins. Co.*, 180 App. Div. 599, 167 N. Y. Supp. 892.

19. See the following paragraph.

20. *Dunn v. Chambers*, 4 Barb. 376; *Smith v. Duffy*, 1 How. Pr. N. S. 340; *Jones v. Commercial Travelers', etc., Assn.*, 114 N. Y. Supp. 589, affirmed, 134 App. Div. 936, 118 N. Y. Supp. 1116, modified, 201 N. Y. 576; *Osgood v. Franklin*, 2 Johns. Ch. 1. "It is quite obvious that the defendant, through the plaintiff's release, made a hard bargain with him. This in itself would be no reason in law or equity for setting aside the release, unless there was fraud or active concealment on the part of the defendant's agents in procuring the instrument. Where people deal at arm's length failure on the part of one party to disclose what he knows does not ordinarily constitute fraud." *Jones v. Commercial Travelers', etc., Assn.*, 114 N. Y. Supp.

589, affirmed, 134 App. Div. 936, 118 N. Y. Supp. 1116, modified, 201 N. Y. 576.

21. *Smith v. Duffy*, 1 How. Pr. N. S. 340; *Franklin v. Osgood*, 14 Johns. 527; *Friedman v. Hirsch*, 18 N. Y. Supp. 85, 44 N. Y. St. Rep. 199.

22. See, *supra*, II-E, Transactions between parties in confidential relations.

23. *Dunn v. Chambers*, 4 Barb. 376; *Smith v. Duffy*, 1 How. Pr. (N. S.) 340; *Franklin v. Osgood*, 14 Johns. 527; *Friedman v. Hirsch*, 18 N. Y. Supp. 85, 44 N. Y. St. Rep. 199.

24. "It is also true that it is not enough to induce even a court of equity to interfere, that a bargain is hard and unreasonable. Every man is presumed to be capable of managing his own affairs; and whether his bargains are wise or unwise, is not, ordinarily, a legitimate subject of inquiry, in a court either of legal or equitable jurisdiction. No principle is better settled than that mere inadequacy does not

fraud, must be so strong and manifest as to shock the conscience and confound the judgment of any man of common sense.²⁵ Even if the inequality is not such as, of itself, to allow an inference of fraud, it is relevant matter, in connection with the other circumstances, as bearing on the existence of fraud.²⁶

K. Payment.

Ordinarily, the fact that an obligation has been paid or satisfied does not authorize an action for its rescission, for the situation may be shown as a defense to any proceeding to enforce the obligation.²⁷ In the absence of special circumstances calling for the interposition of a court of equity, an action cannot be maintained to compel the surrender of a promissory note past due, upon the ground that it has been paid but not taken up.²⁸ But a court of equity will assume jurisdiction of the controversy if it appears that there is not an adequate remedy at law.²⁹ If the obligation creates a cloud on the title to real property, an equitable ground for relief is presented. Thus, an action may be

form a distinct ground of equitable relief. And yet there are cases, where there is no positive evidence of fraud, in which the inequality of the bargain is so gross, that the mind cannot resist the inference, that though there be no direct evidence of fraud, such a bargain must have been, in some way, improperly obtained. In such cases, a court of equity will avoid a bargain, not merely on account of its gross inequality, but because that inequality furnishes 'the most vehement presumption of fraud.' The cases of such interference are, however, very few. In most of the instances in which a party has been relieved from his own improvident bargain, there have been some circumstances of a suspicious character connected with the transaction, or there has been something in the relation which the parties sustained to each other, which rendered it inequitable that the party, against whom relief was sought, should retain the advantage he had acquired by his

bargain." *Dunn v. Chambers*, 4 Barb. 376.

25. *Osgood v. Franklin*, 2 Johns. Ch. 1.

26. *Jones v. Jones*, 120 N. Y. 589.

27. *Fowler v. Palmer*, 62 N. Y. 533. See, *supra*, I-E, Necessity of Relief.

27. *Fowler v. Palmer*, 62 N. Y. 533.

29. **Agreement of surety.**—Where the surety of a tenant deposited with a trust company bonds to secure performance by the tenant under an agreement with the company that the bonds should not be delivered back within a certain period of time, and the lease became null and void by the failure of the landlord to adapt the premises to the tenant's business, as it agreed to do, and it is doubtful if the plaintiff could maintain a possessory action at law to recover the bonds until the expiration of the period named in the agreement under which they were deposited, or that in any action at law it could be adjudged that such agreement had become void,

maintained to cancel the lien of a mortgage, which, in fact, has been satisfied, but no formal discharge has been recorded.³⁰ A novation which has discharged a mortgage may be pleaded as the basis for equitable relief.³¹ Where the will of the *cestui que trust* has directed the cancellation of a mortgage held by the nominal mortgagee in trust simply, and the mortgage had been assigned, subsequent to the testator's death, to one having knowledge of the facts, the mortgagor is entitled to have the mortgage cancelled.³² The tender of the amount due on a mortgage may discharge the lien thereof, authorizing its discharge,³³ but such tender must be kept good and the amount unpaid must be brought into court.³⁴

an action in equity is maintainable to cancel the agreement of the surety and direct the return of the bonds. *Taylor v. Dinsmore*, 68 Misc. 143, 124 N. Y. Supp. 936.

30. *Beach v. Cooke*, 28 N. Y. 508; *Gibbons v. Campbell*, 148 N. Y. 410; *Levy v. Merrill*, 14 Hun 145.

Action by creditor.—Where a mortgage or a judgment, which has been paid, is continued as an apparent lien for inequitable purposes, as for defrauding creditors, an action is maintainable by the purchaser on execution sale of lands, so apparently incumbered, to compel its satisfaction of record. *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

31. *Livingston v. Moore*, 15 App. Div. 15, 44 N. Y. Supp. 125, appeal dismissed, 161 N. Y. 602.

32. *Gibbons v. Campbell*, 148 N. Y. 410.

33. *Foster v. Mayer*, 70 Hun 265, 24 N. Y. Supp. 46, 56 St. Rep. 114.

34. *Tuthill v. Morris*, 81 N. Y. 94; *Foster v. Mayer*, 70 Hun 265, 24 N. Y. Supp. 46, 56 St. Rep. 114. "A party coming into equity for affirmative relief must himself do equity, and this would require that he pay the debt secured by the mortgage, and the costs and interest, at least up to the time of the tender. There can be no pretense of any equity in depriving the

creditor of his security for his entire debt, by way of penalty for having declined to receive payment when offered. The most that could be equitably claimed would be to relieve the debtor from the payment of interest and costs subsequently accruing, and to entitle him to this relief, he should have kept his tender good from the time it was made. If any further advantage is gained by a tender of the mortgage debt, it must rest on strict legal rather than on equitable principles. The circumstance that a security has become or is invalid in law, and could not be enforced, even in equity, does not entitle a party to come into a court of equity, and have it decreed to be surrendered or extinguished, without paying the amount equitably owing thereon. Even securities void for usury would not be canceled by a court of equity, without payment of the debt with legal interest, until, by statute, it was otherwise provided. This statute does not change the general principle of equity, but on the contrary recognizes it, by excepting cases of usury from its operation. On this ground, even if the alleged tender could be sustained, the plaintiff was not entitled to a decree for the unconditional extinguishment of the mortgage." *Tuthill v. Morris*, 81 N. Y. 94.

L. Usury.

Section 373 of the General Business Law apparently authorizes the maintenance of an action to declare the invalidity of a usurious loan,³⁵ yet a court of equity will not assume jurisdiction of an action for that purpose, if the rights of the obligor can be fully protected in an action for the enforcement of the loan.³⁶ The action is rarely permitted except as between the original parties to the transaction.³⁷ A purchaser of premises subject to a mortgage, cannot maintain a suit to avoid the mortgage on the ground of usury.³⁸ A corporation is prohibited by section 374 of the General Business Law from interposing the defense of usury, and the courts will not permit it to maintain an affirmative suit in equity to set aside a transaction on the ground of usury.³⁹

In a case where equity assumes jurisdiction, if the action is brought by the "borrower," it is not necessary that he pay or offer to pay any principal or interest of the loan, but one who is not classed as a "borrower" must restore the loan as a condition of affirmative relief.⁴⁰

M. Ultra vires.

If it appears upon the face of a corporate contract that it is *ultra vires*, or if the opposing party is under the obligation of showing its validity in case an action is brought for its enforcement, there is no necessity for an equitable action to declare its invalidity.⁴¹ Subject to this limitation,

35. *Barnes v. Gilmore*, 6 Civ. Proc. 286; *Taylor v. Grant*, 3 Jones & S. (35 Super. Ct.) 353; *Perrine v. Striker*, 7 Paige 598.

36. *Kalnitzky v. Golden*, 205 App. Div. 45, 199 N. Y. Supp. 120. See, *supra*, I-E-10, Necessity of Relief—Usurious Loan.

37. *Kalnitzky v. Golden*, 205 App. Div. 45, 199 N. Y. Supp. 120.

The surety in an usurious contract, as well as the principal debtor, is a borrower, within the intent and meaning of the fourth section of the act of May, 1837, to prevent usury, which authorizes the borrower to file a bill in chancery for the discovery of or

relief against the usurious contract or security. *Perrine v. Striker*, 7 Paige 598.

38. *James v. Oakley*, 1 Abb. Pr. 324.

39. *Isle of Wight Co. v. Smith*, 51 Hun 562, 4 N. Y. Supp. 73, 22 St. Rep. 862.

40. See, *supra*, I-F-6, Restoration of Benefits Received—Usurious Loan.

41. *Dudley v. Order of St. Francis*, 65 Hun 21, 19 N. Y. Supp. 605, 47 St. Rep. 60, affirmed, 138 N. Y. 451. See, *supra*, I-E-2, Necessity for Relief—Invalidity appearing on face of instrument.

a corporation may in some cases maintain an action to cancel an apparent, but unauthorized, obligation.⁴² A note, executed by the officers of a banking corporation without authority should be canceled, where it appears that it was issued for purposes foreign to those of the corporation, which received no benefit from the proceeds thereof.⁴³ A transfer of stock of a gas or electrical corporation in violation of section 70 of the Public Service Commissions Law, may be rescinded.⁴⁴

N. Illegality.

Illegality, as may be noted in many of the foregoing paragraphs, may form a ground for the rescission of an instrument.⁴⁵ As a general rule, however, equitable jurisdiction

42. Spurious certificates of stock in a railroad corporation, issued by the officer having apparent authority to do so, undistinguishable upon their face from the certificates of genuine stock, and outstanding in the hands of numerous holders as evidences of interests in the property of the corporation, are clouds upon the title of the genuine stockholders which a court of equity will remove. The corporation may institute a suit for this purpose, not, it seems, as a trustee of the property and funds under its control, asking advice and aid for its own benefit, but as the representative of the genuine stockholders and in their behalf. The false certificates having a common origin and common ground of invalidity, the holders, although they become such under different circumstances and conveyances, and claim different rights, are all properly joined as defendants in an action for the cancellation of the certificates. The joinder of too many persons as defendants, where there is no misjoinder of subjects, is not a ground of demurrer by any one of them against whom the claimant states a good cause of action. *New York, etc., R. Co. v. Schuyler*, 17 N. Y. 592.

A foreign corporation cannot maintain an action to procure the can-

cellation of certificates of stock alleged to have been illegally issued by its officers, in the absence of allegations showing that the corporation had the right to issue certificates of stock representing its capital or that the certificates alleged to have been illegally issued were executed by an officer having authority to execute them, or that they resembled in some degree certificates rightfully issued, or that some one had been, or would be, deceived or misled, damaged or injured by the purchase of them. *Reno Oil Co. v. Culver*, 60 App. Div. 129, 69 N. Y. Supp. 969.

43. *Emmet v. Northern Bank* of New York, 173 App. Div. 840, 160 N. Y. Supp. 183, affirmed without opinion, 221 N. Y. 506.

44. *Gray v. Gill*, 125 Misc. 70, 210 N. Y. Supp. 658, affirmed, 214 App. Div. 833, 211 N. Y. Supp. 915.

45. Sale of stock contrary to by-laws.—A stockholder of a corporation the by-laws of which provide that the shares of stock shall not be transferred by any stockholder until they are first offered to the corporation, which provision is printed on the certificates of shares issued by the corporation, has the right to have the sale of shares made to the appellants

will not be exercised on this ground, if there exists an adequate remedy at law. If the illegality appears on the face of the instrument, or is a matter of public record, a party's rights are usually completely protected without permitting him to maintain a suit for affirmative relief. This situation frequently arises when one desires to attack municipal obligations or tax assessments.⁴⁶ Moreover, equitable relief may be denied when the plaintiff does not come into court with clean hands, as where he is *in pari delicto* in making the illegal agreement.⁴⁷

Subject to these general principles, an agreement which is immoral or against public policy, such as a marriage brokerage contract,⁴⁸ a transaction for the compounding of a felony, or a forged agreement,⁴⁹ may be rescinded. A conveyance does not become effective, until it is delivered, and an undelivered instrument, or one which has been delivered through mistake, may be cancelled.⁵⁰

ARTICLE III.

PROCEDURE.

A. Statute of limitations.

The limitation applicable to an action of rescission, is, when relief is sought on the ground of fraud, controlled by subdivision 5 of section 48 of the Civil Practice Act.⁵¹ Under this section, the action is to be commenced within six years after the accrual of the cause of action, but it is not

set aside, where it appears that the shares so purchased by the appellants were purchased without said shares being offered by the owner to the corporation prior to the purchase by the appellants, and where it appears that the appellants who were former directors of the corporation knew about the restriction and made the purchase for the avowed purpose of securing control of the corporation. *Hassel v. Pohle*, 214 App. Div. 654, 212 N. Y. Supp. 561.

46. See, *supra*, I-E, Necessity of Relief.

47. See, *supra*, I-I, Parties in *pari delicto*.

48. *Duval v. Wellman*, 124 N. Y. 156; *Place v. Conklin*, 23 Misc. 40, 51 N. Y. Supp. 407.

49. *National Bank of West Troy v. Levy*, 127 N. Y. 549; *Caccioppoli v. Lemmo*, 152 App. Div. 650, 137 N. Y. Supp. 643.

50. *Buszozak v. Wolo*, 125 Misc. 546, 211 N. Y. Supp. 557.

Presumption.—The acknowledgment and recording of a conveyance is *prima facie* proof of delivery, or affords grounds to presume an intended delivery. *O'Brien v. O'Brien*, 188 App. Div. 309, 177 N. Y. Supp. 25.

51. *Dennin v. Woodbury*, 96 Misc. 247, 160 N. Y. Supp. 647.

deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.⁵² Prior to 1920, the corresponding section in the Code of Civil Procedure (section 382, subd. 5) was more explicit as to equitable actions, it expressly covering, "An action to procure a judgment, other than for a sum of money, on the ground of fraud, in a case which, on the thirty-first day of December, 1846, was cognizable by the court of chancery."⁵³ There could be no doubt but that this included an action to rescind a written instrument where fraud was alleged as the ground for relief.⁵⁴ In 1920, the statute was amended to read as in its present form, but, upon the enactment of the Civil Practice Act, the earlier form was inadvertently carried into the new code. This situation was remedied by the amendment of the subdivision by Chapter 199 of the Laws of 1921. The word "discovery," as used in the statute, is given a broad interpretation. When facts come to the attention of the plaintiff which would fairly put him on inquiry as to the commission of the fraud, he cannot delay the running of the statute by neglecting to investigate. If the facts coming to his attention are such that he ought to have discovered the fraud, the statute commences to run.⁵⁵ But the statute does not apply to an action by the owner in fee in real estate to remove a claim upon his title by the cancellation of a mortgage thereon to which the owner has a good defense. It is said that the right to bring such an action is never barred by the statute of limitations.⁵⁶ An action to rescind a deed given on condition that the grantee shall support the grantor, is also of a continuing nature, and the cause of action does not accrue until the death of the grantor.⁵⁷

If the action is based on some ground other than fraud,

52. *Sears v. Shafer*, 6 N. Y. 268; *Bosley v. National Machine Co.*, 123 N. Y. 550; *Higgins v. Crouse*, 147 N. Y. 411; *Schenck v. State Line Telep. Co.*, 238 N. Y. 308; *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931; *Stokes v. Stokes*, 119 Misc. 168, 196 N. Y. Supp. 184; *Piper v. Hoard*, 65 How. Pr. 228.

53. *Bosley v. National Machine Co.*, 123 N. Y. 550.

54. *Bosley v. National Machine Co.*,

123 N. Y. 550; *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636; *Piper v. Hoard*, 65 How. Pr. 228; *Mayne v. Griswold*, 3 Sandf. (5 Super. Ct.) 463.

55. *Higgins v. Crouse*, 147 N. Y. 411; *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931.

56. *Schoener v. Lessauer*, 107 N. Y. 111.

57. *Curran v. Hosey*, 153 App. Div. 557, 138 N. Y. Supp. 910.

it is, of course, not within subdivision 5 of section 48, but may be controlled by section 53 of the Civil Practice Act, which prescribes a limitation of ten years and which applies to many actions of equitable cognizance. The ten-year statute may be applied when it is sought to cancel a deed because of the incompetency of the grantor,⁵⁸ or to cancel municipal bonds on the ground that their issue was unauthorized.⁵⁹ An action by a corporation for the cancellation of certain stock certificates on the ground that they were wrongfully issued, is within the ten-year limitation, which begins to run at the time of the issuance of the stock.⁶⁰

The provisions of section 131 and 132 of the Tax Law present a statute of limitations applicable to an action to cancel a tax sale.⁶¹

If affirmative relief cannot be granted on a cause of action because of the expiration of the limitation, the cause cannot be interposed as a defense.⁶²

Outside of such questions as may arise under the statute of limitations, there may exist a question of laches. A delay in seeking relief, although short of the statutory period, may be considered as bearing on the discretion of the court in determining whether the desired relief shall be granted.⁶³

B. Parties.

1. Plaintiffs.

Ordinarily, an action of rescission, like other actions, is to be brought by the real party in interest.⁶⁴ Thus, the person defrauded in a transaction is the person to maintain an action to cancel the agreement; and a person who furnished a part of the consideration therefor is a stranger to the transaction who cannot resort to equity for such relief.⁶⁵

58. *German Sav. Bank v. Wagner*, 164 App. Div. 234, 149 N. Y. Supp. 654, affirmed, 220 N. Y. 608.

59. *Calhoun v. Millard*, 121 N. Y. 69.

60. *East Lake Lumber Co. v. Van-Garder*, 105 Misc. 704, 174 N. Y. Supp. 38, affirmed, 177 N. Y. Supp. 914.

61. *Jackson v. Rowe*, 106 App. Div. 65, 94 N. Y. Supp. 568, affirmed without opinion, 191 N. Y. 512. See also, *Nehasane Park Assn. v. Lloyd*, 167 N. Y. 431.

62. Civ. Prac. Act, § 61. *German Sav. Bank v. Wagner*, 164 App. Div. 234, 149 N. Y. Supp. 654, affirmed, 220 N. Y. 608.

63. *Calhoun v. Millard*, 121 N. Y. 69. And see, *supra*, I-H-3, Delay in asserting claim.

64. Civ. Prac. Act, § 210. *Kalnitzky v. Golden*, 205 App. Div. 45, 199 N. Y. Supp. 120.

65. *Guilfoyle v. Pierce*, 125 App. Div. 504, 109 N. Y. Supp. 924, affirmed without opinion, 196 N. Y. 499.

One who has transferred his interest in the controversy, is not the proper party to maintain the suit.⁶⁶ To the general rule requiring a suit to be maintained in the name of the real party in interest, however, some exceptions are permitted by section 210 of the Civil Practice Act. This section permits a trustee to bring an action in his own name without joining the beneficiary, but it does not forbid the joining of the beneficiary as a party plaintiff.⁶⁷

While, as a general rule, only a party to a sealed instrument can maintain an action thereon, this rule does not apply to an action to rescind the instrument.⁶⁸

An instrument affecting the title to real estate may be attacked by the wife of the grantor, her inchoate right of dower being a sufficient interest to entitle her to maintain the action.⁶⁹

A cause of action for the cancellation of a contract, if maintained on the ground of fraud, is assignable under section 41 of the Personal Property Law,⁷⁰ or after death of the defrauded party, the action may be prosecuted by his personal representative.⁷¹ If the executor or administrator refuses to maintain the action, it may, in some cases be prosecuted by a creditor of the estate under section 268 of

Lease.—If a fraud is practiced upon a landlord, by one desirous of obtaining a lease of premises from him, the lessor may in equity set aside the contract; but no such right accrues to another person from the fact that he also was desirous of obtaining a lease of the same premises, and had applied for one, but had made no agreement therefor, and that the other obtained the same by taking advantage of the lessor's mistaking the lessee for him. Under such circumstances, the party obtaining the lease owes the other no duty, and the latter has acquired no right to a lease; and between them there is no relation of confidence which can create the obligations that arise from a trust. Hence there is no principle of equity which will allow the court to adjudge the lessee to stand in the relation of trustee to him; even though in negotiation for such lease, the lessee concealed the fact that he

did not represent the other party, with whom the lessor supposed himself to be dealing. *Stiner v. Stiner*, 58 Barb. 643, affirmed without opinion, 49 N. Y. 679.

66. *James v. Oakley*, 1 Abb. Pr. 324. See also, *Strong v. Strickland*, 32 Barb. 284.

67. *Cassidy v. Sauer*, 114 App. Div. 673, 99 N. Y. Supp. 1026, affirmed without opinion, 187 N. Y. 540.

68. *Cassidy v. Sauer*, 114 App. Div. 673, 99 N. Y. Supp. 1026, affirmed without opinion, 187 N. Y. 540.

69. *Clifford v. Kampfe*, 147 N. Y. 383; *Blum v. Hoffkins*, 210 App. Div. 748, 206 N. Y. Supp. 587; *Miller v. Miller*, 120 Misc. 100, 198 N. Y. Supp. 454.

70. *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636.

71. *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636.

the Real Property Law or section 19 of the Personal Property Law.⁷² Or, if the contract relates to real estate and the defrauded person has died intestate, the cause of action may pass to his widow and heirs at law.⁷³ When by undue influence a decedent has been induced to transfer both real and personal property, the widow of the decedent, his representative, heirs and next of kin may unite in one action attacking the entire transaction, although their pecuniary interest may not be the same and although some of them may not be entitled to the relief obtained by others.⁷⁴

It is customary practice to appoint a guardian *ad litem* to maintain an action in behalf of an infant plaintiff; but, in some cases, the action may be maintained by his general guardian.⁷⁵

2. Defendants, in general.

All parties to the agreement sought to be cancelled, who would be affected by the granting of the desired relief, should be brought in as defendants.⁷⁶ In an action to rescind a trust, the beneficiary is a necessary party.⁷⁷ Both the trustee and the beneficiary should be joined as defendants if the action is brought by the grantor of the trust or by

72. *National Bank of West Troy v. Levy*, 127 N. Y. 549.

Action by creditor.—A deed executed by a person at the time *non compos mentis*, is absolutely void at law, and a grantee, claiming equitable rights thereunder, has imposed upon him the burden of proving them. Where such a deed is a cloud upon the title to real property, although no fraud is shown, a judgment creditor of an heir of the party by whom such deed was signed may maintain an action in equity to cancel it. *Booth v. Fuller*, 35 App. Div. 117, 54 N. Y. Supp. 670.

73. *Keenan v. Keenan*, 12 N. Y. Supp. 747, 34 St. Rep. 996.

74. *Mullin v. Mullin*, 119 App. Div. 521, 104 N. Y. Supp. 323.

75. *Dold v. Dold*, 103 Misc. 86, 169 N. Y. Supp. 209.

76. *Gugel v. Hiscox*, 216 N. Y. 145; *Smith v. Irvin*, 108 App. Div. 218, 95 N. Y. Supp. 731.

Assignment of mortgage.—Where a bond and mortgage has been assigned to an employee of a bank as security for a loan, and the employee executed another assignment in blank and delivered it to the bank, both the trustee and the bankrupt assignor and the bank itself are necessary parties to a suit to cancel the bond and mortgage on the ground that they were usurious and void. *Slade v. Squier*, 133 App. Div. 666, 118 N. Y. Supp. 278.

The assignee of a mortgage may be made a defendant in an action to set aside the mortgage as usurious. *Niles v. Randall*, 2 Code Rep. 31.

77. *Ducas v. Ducas*, 150 App. Div. 397, 135 N. Y. Supp. 35; *Cazzani v. Title Guarantee & Trust Co.*, 175 App. Div. 369, 161 N. Y. Supp. 884, affirmed on opinion below, 220 N. Y. 683; *Johnson v. Guernsey*, 208 App. Div. 548, 203 N. Y. Supp. 781; *Conkling v. Davies*, 53 How. Pr. 409.

some other person interested therein.⁷⁸ But creditors of an estate are not necessary parties where they are represented by the executor or administrator of the estate.⁷⁹

One who has transferred his interest in the agreement in controversy, is not, as a general rule, a necessary party to an action for its rescission.⁸⁰ But a conveyance of real estate made subject to a mortgage, does not relieve the mortgagor from responsibility, and the mortgage should not be cancelled without making him a party.⁸¹

In equity it is proper to make every one with an apparent or possible interest parties.⁸² All persons who claim under a deed are proper persons in an action for its cancellation.⁸³ But one whose only connection with a transaction is that he aided in the perpetration of the fraud, ordinarily is not a necessary or a proper party in an action to avoid the transaction.⁸⁴ But it has been thought that such a person may be joined, if otherwise the costs of the suit could not be collected.⁸⁵

An action to remove a cloud upon title to real estate

78. *Ducas v. Ducas*, 150 App. Div. 397, 135 N. Y. Supp. 35.

79. *Cutbill v. Scott*, 182 App. Div. 41, 169 N. Y. Supp. 358.

80. *Wright v. Day*, 59 Misc. 76, 111 N. Y. Supp. 1105.

81. *Gilbert v. Averill*, 15 Barb. 20.

82. *Sanders v. Saxton*, 33 Misc. 389, 67 N. Y. Supp. 680.

83. *Quibell v. Morris*, 71 Hun 38, 28 N. Y. Supp. 498.

84. *Wright v. Day*, 59 Misc. 76, 111 N. Y. Supp. 1105; *Cohen v. Ellis*, 4 St. Rep. 721.

85. *Seiferd v. Mulligan*, 36 App. Div. 33, 55 N. Y. Supp. 140. "The origin of the rule that a person through whose instrumentality a fraud has been committed may be made a party to an action to set aside an instrument obtained through such fraud, seems to have been founded upon the right of the complainant to have some one who was answerable for the costs; and thus, where the fraudulent scheme was to vest the title to property, or to obtain some advantage for a person

against whom costs cannot be collected, as an infant or an absentee, then the one responsible for the fraud may be made a party defendant for the purpose of casting such person with the cost, in case such costs cannot be collected from the person who is to benefit by the fraud. But to make such a person a proper party, we think some fact should be alleged taking the case out of the ordinary rule that the proper parties defendant are those who have or claim an interest in the subject matter of the action adverse to the plaintiff, or who are necessary for the complete determination or settlement of the questions involved. To hold otherwise would allow a plaintiff to make parties all those, who, as attorneys or agents, aided in obtaining the execution of an instrument by fraud, although they obtained no property or advantage by the fraud, and no relief was asked as against them." *Seiferd v. Mulligan*, 36 App. Div. 33, 55 N. Y. Supp. 140.

caused by tax sales thereof by the State Comptroller to the State, though not maintainable against the State itself, is maintainable against the Comptroller and the Commissioners of the Land Office.⁸⁶

3. *Bona fide* purchasers.

If a transaction is merely voidable, not void, it is subject to ratification, and stands until some act is done which challenges the effectiveness of the transaction. If before this act is done, some third person, in good faith, without knowledge of the infirmity in the transaction, acquires for value some right or interest therein, he will ordinarily be protected. But if an assignee or transferee does not qualify as such a *bona fide* purchaser, the transaction may be cancelled over his protest.⁸⁷

In order to defend a title on the ground of a *bona fide* purchase, it must be shown that the purchase was made for a valuable consideration, and without notice of any prior equity. When a person, other than the vendor, is in possession of land, the purchaser has constructive notice of the rights of the possessor, and takes the land subject to all his equitable claims. The possession of such third person is sufficient to put the purchaser upon inquiry as to the extent of his rights. And those claiming under the title of such purchaser cannot defend on the ground that he was a *bona fide* purchaser without notice.⁸⁸

A chose in an action is usually transferred subject to the rights between the original parties. Thus, a mortgage secured without consideration may be cancelled although it has been assigned to a third person in good faith and for value.⁸⁹ An assignment of a land contract has also been held to be subject to the equities against the assignor.⁹⁰

⁸⁶. *Sanders v. Saxton*, 33 Misc. 389, 67 N. Y. Supp. 680.

⁸⁷. *Gift*.—One to whom a bond and mortgage, given to secure the price of property upon a fraudulent sale, is assigned without any pecuniary consideration being paid, but simply as a gift, does not occupy the position of a

bona fide purchaser. The contract may be rescinded as to him, *Baker v. Lever*, 67 N. Y. 304.

⁸⁸. *Brice v. Brice*, 5 Barb. 533.

⁸⁹. *Rapps v. Gottlieb*, 142 N. Y. 164.

⁹⁰. *Hendrick v. Lown*, 132 Misc. 498, 230 N. Y. Supp. 141. The correctness of this conclusion may be doubted.

C. Pleadings.

1. Essential allegations of complaint.

The complaint must allege the facts relating to the contract or transaction sought to be avoided.⁹¹ The facts constituting the fraud or other ground for the rescission of the instrument should be alleged.⁹² Bare allegations of fraud, unsupported by facts fairly tending to sustain the charge are insufficient.⁹³ While it is not necessary that the plaintiff should state the evidence on which he relies to establish the fraud, he must aver explicitly the facts constituting the alleged fraud, for mere conclusions will not avail.⁹⁴ All the facts from which the plaintiff desires that a conclusion of fraud be drawn, may properly be stated in the complaint.⁹⁵ The plaintiff must aver the falsity of the representations and the accrual of damage therefrom.⁹⁶

It has been thought in some cases that the plaintiff should rebut the charge of laches which might be drawn from a delay in seeking the remedy.⁹⁷ But ordinarily the question

91. Description of property.—A complaint in an action to annul a trust deed, and to obtain a return of the property held by the defendant under it, is sufficiently definite, if it describes the property in general terms by its location, etc. *Brinkeroff v. Perry*, 12 Week. Dig. 459.

92. Davidson v. Buchanan, 164 App. Div. 352, 149 N. Y. Supp. 640.

93. Schiefer v. Freygang, 125 App. Div. 498, 109 N. Y. Supp. 848, affirmed without opinion, 199 N. Y. 568; *Stein v. Freund*, 215 App. Div. 149, 213 N. Y. Supp. 9; *Butler v. Viele*, 44 Barb. 166; *Hutchinson v. Brown, Clark* 408.

94. Butler v. Viele, 44 Barb. 166.

95. Welcke v. Trasgeser, 131 App. Div. 737, 116 N. Y. Supp. 161.

96. Ritzwoller v. Lurie, 176 App. Div. 100, 162 N. Y. Supp. 475; *Stein v. Freund*, 215 App. Div. 149, 213 N. Y. Supp. 9.

When damage need not be alleged.—A complaint seeking a decree for the return of shares of stock exchanged by the plaintiff for other stock which in substance alleged that the plaintiff

was led into the exchange by false representations of the defendants that a corporation in which they were directors controlled the New York Electric Lines Company, which had a franchise in the city of New York in which other powerful companies were interested, and that with the plaintiff's shares the corporation in which the defendants were directors would own a majority of the capital stock of the company in which the plaintiff was a stockholder, states a cause of action. Such complaint is not demurrable because it does not allege that the plaintiff has been damaged. *Jahn v. Reynolds*, 115 App. Div. 647, 101 N. Y. Supp. 293.

Proof of damage.—The plaintiff need not prove the amount of his damage. *Haessig v. Gregory*, 197 App. Div. 111, 183 N. Y. Supp. 500.

97. Dennin v. Woodbury, 96 Misc. 247, 160 N. Y. Supp. 647; *Dennin v. Powers*, 96 Misc. 252, 160 N. Y. Supp. 636; *Rose v. Merchants' Trust Co.*, 96 N. Y. Supp. 956.

of laches is one to be determined from the particular circumstances developed upon the trial.⁹⁸ The bar of an action by reason of the statute of limitations is a matter which, until comparatively recently, was raised by answer. Now it is raised by answer or motion for judgment.⁹⁹

The plaintiff must generally allege that he has restored to the defendant the benefits received under the contract, or must state a willingness to return such benefits. In a few exceptional cases, however, the plaintiff is not required to make restoration.¹ In some cases it is required that the plaintiff allege that he has rescinded the contract or give notice to the defendant of his election to rescind.²

If the complaint alleges a cause of action in equity and the proof establishes facts which justify equitable relief, an adequate remedy at law can not be urged as a defense unless pleaded. Such objection cannot be raised for the first time on a motion to dismiss.³ An allegation in an answer in a suit in equity that the plaintiff has an adequate remedy at law,

98. *Schenck v. State Line Telep. Co.*, 238 N. Y. 308.

99. *Sears v. Shafer*, 6 N. Y. 268; *Schenck v. State Line Telep. Co.*, 207 App. Div. 454, 200 N. Y. Supp. 772, affirmed, 238 N. Y. 308; Civil Prac. Act, § 30; Rules of Civil Practice, Rule 107.

1. *Nelson v. Hatch*, 56 App. Div. 149, 67 N. Y. Supp. 570; *City of Ironwood v. Wickes*, 93 App. Div. 164, 87 N. Y. Supp. 554; *Mincho v. Bankers' L. Ins. Co.*, 124 App. Div. 578, 109 N. Y. Supp. 179; *Spencer v. Clarke*, 1 N. Y. Supp. 533, 15 St. Rep. 949. See, supra, I-F, Restoration of benefits received by plaintiff.

2. *Sorenson v. Keesey Hosiery Co.*, 244 N. Y. 73.

3. *Bloomquist v. Farson*, 222 N. Y. 375; *Kaston v. Zimmerman*, 192 App. Div. 511, 183 N. Y. Supp. 615; *Forster v. Wilshusen*, 14 Misc. 520, 35 N. Y. Supp. 1083; *Palmer v. Jones*, 69 Hun 240, 23 N. Y. Supp. 584, 53 St. Rep. 355; *Rose v. Merchants' Trust Co.*, 96 N. Y. Supp. 956. See also, *Edmonds v. Stern*, 89 App. Div. 539, 85 N. Y. Supp. 665, wherein it was said: "True

a defendant in case of doubt should not be left to the mercy of the plaintiff and it would be entirely proper to interpose the defense that the plaintiff has an adequate remedy at law where from the allegations of the complaint itself it is uncertain as to what may be the final relief to which upon the facts the plaintiff is entitled. In other words, where from the facts alleged it is uncertain as to whether the plaintiff is entitled to legal or equitable relief, and the prayer for judgment asks for equitable relief, in such a case the defense that the plaintiff has an adequate remedy at law is proper. So too, where it is certain upon the facts pleaded, and apart from the prayer for relief, that the plaintiff has only a remedy at law, where it is proper to interpose such a defense to enable the plaintiff to avail himself of that plea. But where, as here, upon an examination of the complaint it is certain from the facts alleged and the prayer for judgment that what the plaintiff seeks and what he is entitled to obtain, if anything, is equitable relief, then in such a case a defense that

without setting forth facts to support it, merely states a legal conclusion, and is insufficient if the complaint sets forth facts showing a cause of action in equity.*

Where, in a suit to cancel alleged certificates of sale and a lease, upon the ground that they are void and constitute a cloud upon the plaintiff's title, and also to recover an award made by the State to the defendants because of their claim to ownership under said certificates and lease, it is not alleged that the instruments are valid upon their face, and that it is necessary in order to establish their invalidity to resort to extrinsic evidence, the complaint is insufficient; it fails to show that in an action of ejectment the plaintiffs have not an adequate and complete remedy at law.⁵

2. Joinder of causes of action.

Section 258 of the Civil Practice Act regulates the joinder of two or more causes of action in the same complaint. A cause of action for money damages and a cause of rescission may be joined, if they both fall within the same subdivision of section 258; otherwise they cannot be so united.⁶ A deed and a will may both be set aside in the same action.⁷ A suit in equity for the rescission of a contract against a principal and a cause for damages against the agent who made the misrepresentations on which the claim for rescission is made, may be united in the same complaint; but separate actions cannot be maintained at the same time, one against the principal for rescission and one against the agent for damages.⁸ The fact that in an action to rescind an instrument, the plaintiff states two or more grounds for relief, such as fraud, duress, mistake or other ground, does not impute an intention to allege more than one cause of action.⁹

Where among defendants there is neither community of

he has an adequate remedy at law cannot be interposed, because, as a defense, it is insufficient in law."

4. *Schiefer v. Freygang*, 125 App. Div. 498, 109 N. Y. Supp. 848, affirmed without opinion, 199 N. Y. 568; *Levan v. American Safety Table Co., Inc.*, 222 App. Div. 110, 224 N. Y. Supp. 841.

5. *Whitney v. Considine Investing Co.*, 176 App. Div. 157, 162 N. Y. Supp. 507.

6. *Baldwin v. A. B. Leach & Co.*, 214 App. Div. 725, 210 N. Y. Supp. 331.

7. *Alfred University v. Frace*, 193 App. Div. 279, 184 N. Y. Supp. 216. Compare, *Davidson v. Buchanan*, 164 App. Div. 352, 149 N. Y. Supp. 640.

8. *Turner Lumber Co. v. Lacey*, 201 App. Div. 41, 193 N. Y. Supp. 656.

9. *L. D. Garrett Co. v. Astor*, 67 App. Div. 595, 73 N. Y. Supp. 966; *Hay v. Hay*, 13 Hun 315.

right nor interest in the subject-matter of the action, nor community of interest in the questions of law and fact involved in the general controversy, the independent causes of action at law may not be consolidated into one cause of action in equity. Where several promissory notes were obtained from plaintiff through deceit, and were transferred to different defendants by independent and separate transactions, and such defendants were joined in an action to have them adjudged void, it was held, that neither the complaint nor the proof disclosed an adequate cause for maintaining such an action in equity.¹⁰

3. Variance.

A variance between the proof and an allegation in a pleading is not material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits.¹¹ If the plaintiff has alleged two grounds for relief, but only one is established by the evidence, the complaint will not be dismissed, but relief will be granted according to the ground proved.¹² Where a complaint alleges both fraud in making a contract and a continuous breach and repudiation thereof as the grounds upon which it should be rescinded, the allegations of fraud may be rejected, and judgment granted upon the allegations of breach and repudiation.¹³ One who seeks rescission on the ground of fraud, may succeed, although he fails to prove the fraud, if he establishes a material false representation innocently made.¹⁴ Or, one seeking rescission of a deed on the ground that it was a forgery, may be allowed to succeed on proof that the execution of the deed was procured by fraud.¹⁵ Earlier decisions can be found more strictly confining a litigant to the allegations of his pleading.¹⁶

10. *Warnock Uniform Co. v. Garifalos*, 224 N. Y. 522.

11. *Civ. Prac. Act*, § 434.

12. *Giarratano v. McIlwain*, 215 App. Div. 644, 214 N. Y. Supp. 582.

13. *Callanan v. Keeseville, etc., R. Co.*, 199 N. Y. 268.

14. *Bloomquist v. Farson*, 222 N. Y. 375.

15. *Caccioppoli v. Lemmo*, 152 App. Div. 650, 137 N. Y. Supp. 643.

16. See, *Absalon v. Sickinger*, 102

App. Div. 383, 92 N. Y. Supp. 601; *Grabush v. Goodman*, 16 St. Rep. 910; *Fisher v. Bishop*, 16 Week. Dig. 194.

Material variance.—Under a complaint seeking to set aside a bond and mortgage as induced by fraud and alleging in substance that the plaintiff gave real estate brokers money to purchase certain lands, that they purchased the same in the name of a dummy and through him sold it to the plaintiff for a much larger sum, in-

4. Counterclaim.

In an action to enforce a contract according to its terms, the defendant may properly interpose a counterclaim, alleging fraud or some other infirmity in the contract, and praying affirmative relief in the way of cancellation.¹⁷ On the other hand, in an action for rescission, it is doubtful if a claim for breach of the contract in controversy is a proper counterclaim.¹⁸ As stated in section 266 of the Civil Practice Act, a counterclaim must tend to diminish or defeat the plaintiff's recovery, and a counterclaim for damages under such circumstances does not usually have this effect.¹⁹ In any event, a counterclaim for damages must be complete in itself, and must, therefore, contain an allegation of due performance by the defendant of the terms of the contract to be performed by him.²⁰

5. Form of complaint in action to cancel a separation agreement.²¹ (Title.)

The complaint of the above named plaintiff respectfully shows that on or about the 15th day of May, 1883, the plaintiff and ducing her to give back the mortgage for the balance of the price, there can be no recovery where the evidence shows that the plaintiff employed the defendants to purchase an entirely different piece of land and the title being found defective, sold her another lot which they had already purchased in the name of a third person, and that the plaintiff had knowledge of all said facts. Under the circumstances there was a fatal variance between the pleading and the proof. *Reilly v. Haseltine*, 127 App. Div. 64, 111 N. Y. Supp. 457.

A complaint in an action to set aside conveyances and other instruments affecting real property, on the ground that they were obtained by fraud, is not sustained by proof that they constitute a mortgage from which the plaintiff has a right to redeem. This is not a mere variance, but a failure to prove the cause of action in its entire scope and meaning. *Patterson v. Patterson*, 1 Rob. (24 Super. Ct.) 184, 1 Abb. Pr. N. S. 262.

17. *Flynn v. Smith*, 111 App. Div. 870, 98 N. Y. Supp. 56.

18. *Equitable L. Assur. Cos. v. Rillat*, 127 Misc. 68, 215 N. Y. Supp. 277.

Proper counterclaim.—In this action to cancel a promissory note made by plaintiff to defendant, the making of which plaintiff claims was induced by fraud, a counterclaim which alleges that the note is due and that plaintiff has in her possession property transferred to her without consideration and for the purpose of defrauding the defendant and other creditors, not only tends to diminish or defeat plaintiff's recovery within the meaning of section 266 of the Civil Practice Act, but arises out of the same transaction, and, consequently, a motion to strike out said counterclaim must be denied. *Newton v. Otselic Valley Nat. Bank*, 132 Misc. 148, 229 N. Y. Supp. 541.

19. *Equitable L. Assur. Cos. v. Rillat*, 127 Misc. 68, 215 N. Y. Supp. 277.

20. *United States Expansion Bolt Co. v. Narmorstein*, 181 App. Div. 790, 169 N. Y. Supp. 244.

21. This form is taken from the case

defendant were married at the village of Henderson in the State of New York, and that both plaintiff and defendant were and still are at the commencement of this action, residents of said state.

That the plaintiff continued to reside with the defendant, as his wife, until about the 12th day of October, 1892.

That during the time she lived and cohabited with said defendant as aforesaid, she conducted herself with propriety, managed the household affairs of her said husband with prudence and economy, and at all times treated her said husband with kindness and forbearance; but that the said defendant disregarding the solemnity of his marriage vow, and his obligation to treat the plaintiff with kindness and attention, within about a year after their said marriage, commenced a course of unkind, harsh and tyrannical conduct towards her, which continued with very slight intermissions, until she finally separated from him on or about the 12th day of October, 1892.

And the plaintiff further shows that on divers occasions while the said plaintiff lived with the said defendant, as aforesaid, he was guilty of cruel and inhuman treatment of her, and of such conduct towards her as rendered it unsafe and improper for her to cohabit with him, to wit:

He was peevish and fretful toward plaintiff; scolded and found fault with her almost constantly; often said he didn't care for plaintiff; called her many opprobrious names; frequently told her she had no right there, to leave, to be gone, and that he did not want her there; attempted on different occasions to and did greatly scare and frighten plaintiff in the night; he was very penurious and often refused to furnish sufficient articles of food for plaintiff; refused to buy tea for plaintiff and objected so much to her drinking tea that she was compelled to and did give it up; lied outrageously to and about plaintiff; often made her cry; he would frequently tell plaintiff that certain persons told him he ought to kill her; he often threatened to and did strike plaintiff on several occasions, at one time knocking her down, and which striking caused plaintiff great bodily pain and injury and much mental anguish, and from which bodily injuries plaintiff has never recovered and is still suffering.

That defendant agreed to give plaintiff two thousand dollars when they were married, but he has failed and refused and still refuses to give plaintiff said two thousand dollars or any part thereof.

That in these and in divers and many other ways defendant cruelly and inhumanly treated plaintiff, and so conducted himself toward her as to render it unsafe and improper for her to cohabit with him.

That defendant is a man of violent passions and ungovernable temper.

That in consequence of defendant's cruel treatment of and conduct toward plaintiff as aforesaid, she became very sick and ill in mind and body and so continued for a long time prior to October 12th, 1892, at which time and for the same reasons and also in consequence of fraud, undue influence, force and duress exercised by defendant toward plaintiff she was obliged and compelled to sign the agreement dated October 12th, 1892, a copy of which is hereto annexed marked Schedule "A," and made to form a part of this complaint.

That since on or about said October 12th, 1892, defendant and plaintiff have lived apart, and she has been compelled to and has supported and maintained herself.

Plaintiff further alleges upon information and belief, that on said October 12th, 1892, defendant was worth thirty thousand dollars, was in good health, and then had and still has no children or anyone dependent upon him for support except plaintiff.

Plaintiff further alleges that the household goods referred to in said agreement of October 12th were very old and of little value, and that the provisions contained in said agreement for the support of plaintiff were entirely insufficient and inadequate for that purpose, and not a proper or suitable provision for the wife of defendant, and said agreement was and is in derogation of and a fraud upon the property and other rights of plaintiff as the wife of defendant.

That on or about October 31st, 1895, plaintiff caused to be served upon defendant the notice, a copy of which is hereto annexed, marked Schedule "B," and made to form a part of this complaint.

The defendant has refused and still refuses to set aside said agreement of October 12th or any part thereof. But this plaintiff hereby offers to set aside, cancel and henceforth treat said agreement as null and void, also hereby offering to restore so far as she is able, all that she received thereunder.

Plaintiff further alleges on information and belief that defendant will be eighty-eight years old in March, 1896; that he is in feeble health and not likely to live long.

Plaintiff further alleges that she is sixty-six years of age and in poor health, the owner of but little property and has no adequate means of support, and that unless said agreement of October 12th is cancelled and set aside she is likely to be very soon in destitute circumstances and dependent upon friends or public charity for support.

Wherefore plaintiff demands judgment that said agreement of October 12th, 1892, may be cancelled and set aside as null and void, with costs of this action, and such other and further relief as may be just and proper.

(Copy of agreement and notice were annexed to the complaint.)

6. Form of complaint in action to cancel contract for sale of land.²²

(Title.)

The plaintiff for his complaint alleges:

First. Upon information and belief, that at all the times hereinafter mentioned the defendant, the William Rosenzweig Realty Operating Company, was and still is a domestic corporation duly organized under the laws of the State of New York.

Second. That on or about the 23rd day of February, 1905, the plaintiff entered into an agreement in writing with the defendant

of *Hungerford v. Hungerford*, 161 N. Y. case of *Davis v. Rosenweig*, 192 N. Y. 128.
550.

22. This complaint was used in the

company for the purchase by the plaintiff of certain vacant lots situate on the east side of St. Nicholas Avenue, in the City of New York, Borough of Manhattan, more particularly described in said agreement, for the consideration of one hundred and twenty-five thousand dollars, to be paid as therein provided, a copy of which agreement is hereunto annexed and is marked Exhibit A and made a part of this complaint. That upon the execution of said agreement the plaintiff paid to the defendant company the sum of five thousand dollars.

Third. That at the time said agreement was made the defendants represented to the plaintiff that the bottom of said lots was good, that they had had it tested and that it was a sand bottom ready for the erection of flats and induced the plaintiff to believe that the bottom of said lots was not made ground, but natural ground, and would not require any extraordinary amount of excavation for the purpose of placing a foundation for the buildings that might be erected thereon. That the aforesaid representations were false and fraudulent and were known so to be to the defendants, as this plaintiff is informed and believes, at the time of the making of the same, and were made by the defendants for the purpose of inducing the plaintiff to enter into said agreement, and this plaintiff, relying upon said representations, was deceived thereby and was thereby induced to enter into the said agreement without testing the bottom of said premises, and was induced thereby to pay to the defendant company upon the execution of said agreement the sum of five thousand dollars above mentioned. This plaintiff alleges upon information and belief that the bottom of said lots is not good, that the same is not a sand bottom and is not ready for the erection of flats thereon, but that on the contrary the said bottom consists of made ground and that it will require an excavation of from thirty to forty feet for the proper construction of the foundation of flats that may be erected on said premises. The plaintiff further alleges upon information and belief that the defendants had not had the bottom of said lots tested prior to the making of the agreement aforesaid.

Fourth. That upon learning that the said representations aforesaid were untrue, the plaintiff demanded of the defendants the return of the said sum of five thousand dollars and a rescission of the agreement aforesaid, but the defendants refused and still refuse to pay the said sum or any part thereof or to rescind said agreement.

Fifth. Upon information and belief that at the time the said agreement Exhibit A was entered into the defendant William Rosenzweig was, and still is, the president of the defendant company, owning all its stock, and was, and still is, the manager and owner of the defendant company. That the defendant William Rosenzweig had personal charge on behalf of the defendant company of the execution of said agreement and of all of the negotiations relating thereto; that the false representations above mentioned were made by the defendant Rosenzweig personally to this plaintiff. That at the time the said agreement was executed the defendant company was under contract to purchase the premises therein described and thereafter the defendant company completed its said contract of

purchase, but title to said premises was taken in the name of the defendant William Rosenzweig, who paid no consideration therefor and is not a *bona fide* purchaser of said premises for value, but is merely a dummy for the defendant company and holds title to said premises for the benefit of the defendant company, with full knowledge of all matters hereinbefore alleged.

Wherefore the plaintiff demands judgment against the defendants as follows:

First. That the said agreement Exhibit A be rescinded by reason of the false and fraudulent representations aforesaid.

Second. That the defendants be adjudged to pay to the plaintiff the sum of five thousand dollars with interest from February 23rd, 1905, and that the plaintiff be adjudged to have a lien upon the above named premises described in said agreement for the sum of five thousand dollars and interest thereon from February 23rd, 1905; that the defendants and all persons claiming under them subsequent to the filing of the notice of the pendency of this action in the office of the County Clerk may be barred and foreclosed of all right, title, claim, lien, interest and estate in said premises; that all the estate, right, title and interest of the said defendants in said premises may be decreed to be sold according to law; that the moneys arising from such sale may be brought into Court; that the plaintiff may be paid out of the proceeds of such sale the moneys paid by him on account of the purchase price as aforesaid with interest from February 23rd, 1905, together with the expenses of the sale and the costs and disbursements of this action so far as the amount of such moneys will pay the same; that the defendants may be adjudged to pay any deficiency which may remain after applying all of such moneys applicable thereto; and that the plaintiff may have such other or further relief as may be proper; together with the costs of this action.

(Copy of contract annexed to complaint.)

D. Venue.

Under section 183 of the Civil Practice Act, an action to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property or a chattel real, is to be tried in the county in which some part of the property is situated. This section applies to an action to cancel a lease of real property and to recover possession thereof.²³ An action to rescind an executed contract for the sale of land is likewise to be tried in the county where the property is situated.²⁴ The proper venue of an action to

²³ Nassau Hotel Co. v. Barnett, 164 App. Div. 203, 149 N. Y. Supp. 645.

²⁴ Birmingham v. Squires, 139 App. Div. 129, 123 N. Y. Supp. 906.

cancel a real estate mortgage is in the county where the incumbered premises are situated.²⁵

An action brought by a citizen of the State of New York, in which he seeks the annulment of a grant of a right of way in the Adirondack preserve made by the Forest Commission to a railroad corporation, is an action which affects real property, and must be tried in the county in which the lands in question are situated.²⁶

E. Provisional remedies.

An order or arrest is granted under subdivision 6 of section 826 of the Civil Practice Act, where the action is brought to recover damages for fraud or deceit. An action of rescission, though based on the ground of fraud, is not always within this subdivision. An order of arrest may be granted, however, when the plaintiff is seeking to recover money which was procured from him by fraud, and as additional relief asks that the instruments signed at the time of the consummation of the fraud be cancelled.²⁷

Under Article 60 of the Civil Practice Act (sections 974-977), in a proper case, a receiver of the property involved in an action of rescission may be appointed.²⁸ Good reason must be shown before the court through the medium of a receiver will take possession of the property.²⁹

In an action to rescind a written instrument which is in the hands of the defendant, if there is danger that the instrument will be transferred to a third person to the prejudice of the plaintiff, a temporary injunction may be granted restraining a transfer during the pendency of the action.³⁰ If the action affects the title to real property, an injunction may be granted under section 981 to prevent waste or damages to the property during the pendency of the suit.³¹

25. *North Shore Industrial Co. v. Randall*, 108 App. Div. 232, 95 N. Y. Supp. 758.

26. *Sherman v. Adirondack Ry. Co.*, 92 Hun 39, 36 N. Y. Supp. 692, 71 St. Rep. 746.

27. *Aaron v. Richmond*, 111 Misc. 549, 181 N. Y. Supp. 723.

28. *Ashley v. Ashley*, 59 App. Div. 611, 69 N. Y. Supp. 173.

29. *Congelton v. Beecher*, 56 App. Div. 617, 67 N. Y. Supp. 747.

30. *Wolff v. Altman*, 196 App. Div. 549, 187 N. Y. Supp. 902. See also, *La Follette v. Noble*, 13 Misc. 574, 34 N. Y. Supp. 955.

31. *Littlejohn v. Leffingwell*, 40 App. Div. 13, 57 N. Y. Supp. 839.

F. Trial of issues.

An action for the rescission of a written instrument is an equitable action, and a jury trial of the issues is not a matter of right.³² If a counterclaim and a reply thereto raise an issue triable by jury, section 424 authorizes a separate trial of that issue.³³ But an action to recover a debt is not an equitable action merely because the plaintiff asks to have a receipt for the payment of the debt cancelled; and the issues are triable by a jury.³⁴

A complaint which shows no cause of action for equitable relief is properly dismissed where it is plainly framed in equity and the cause was placed on the calendar for the trial of issues of fact by the court at Special Term and was there brought on for trial and the plaintiff made no request that the action be retained and transferred to the calendar for the trial of issues by a jury.³⁵

G. Relief granted.**1. In general.**

As a general rule, a successful action of rescission results in a decree adjudicating the invalidity of the instrument in controversy and directing its cancellation. Usually, additional relief is granted according to the equities of the situation.³⁶ Equity will administer such relief as the exigencies of the case demand at the close of the trial.³⁷ One of the fundamental distinctions between a suit in equity and an action at law is that, in the former, relief is given upon the facts as they exist at the date of the decree, while, in the latter, the judgment deals with the facts as they existed at the time of the commencement of the action.³⁸ If an answer has been interposed, the plaintiff is authorized by

32. *Equitable L. Assur. Soc. v. Rillat*, 127 Misc. 68, 215 N. Y. Supp. 277; *Ranney v. Warren*, 17 Hun 111.

Waiver of jury trial.—If the action is placed on the calendar as an equitable cause by both parties, and the defendant's attorney agrees that it shall be tried by the court after the discharge of the jury, there is a waiver of any right to jury trial. *Alfred University v. Frace*, 193 App. Div. 279, 184 N. Y. Supp. 216.

33. *Equitable L. Assur. Soc. v. Rillat*, 127 Misc. 68, 215 N. Y. Supp. 277.

34. *Rose v. McCaldin*, 195 N. Y. 210.

35. *Kaston v. Zimmerman*, 192 App. Div. 511, 183 N. Y. Supp. 615.

36. See following paragraph.

37. *Bloomquist v. Farson*, 222 N. Y. 375; *Weigel v. Cook*, 193 App. Div. 520, 184 N. Y. Supp. 593, modified and affirmed, 237 N. Y. 136.

38. *Turner Lumber Co. v. Lacey*, 201 App. Div. 41, 193 N. Y. Supp. 656.

section 479 of the Civil Practice Act to take any judgment consistent with the case made by the complaint and embraced within the issue.³⁹ The rescission is decreed, not as of the date of the decree, but as of the date of the unequivocal and open declaration of the injured party that he demands a rescission.⁴⁰ The rescission of a contract destroys it *ab initio* and leaves the parties in the same situation as if no contract had ever been made, and all rights derived from the contract by either party fall with it.⁴¹

2. Relief in addition to rescission.

In order to give full relief to the plaintiff, it is frequently necessary to give him relief in addition to the bare adjudication of the invalidity of the instrument. Thus, if a written instrument operates as the bar to a recovery by the plaintiff of a sum of money claimed by the plaintiff to be due from the defendant, if the plaintiff is successful in cancelling the instrument, he may also be allowed in the same action to recover the money.⁴² This situation arises when the plaintiff seeks to cancel the release of a claim and to recover the amount thereof.⁴³ But, in addition to a rescission and a return of money paid, the court should not also make an award of damages.⁴⁴

Upon the cancellation of an instrument, it is proper to restrain the defendant from continuing any legal proceedings, through which he is attempting to assert a right based on the validity of the instrument. The power to control and restrain the proceedings in a pending action, in such a case, is a necessary part of the remedy which a court of equity is supposed to be capable of administering completely.⁴⁵

If the action to rescind an instrument under which the defendant has been holding property, which by the decree is restored to the plaintiff, the defendant may be compelled to

39. *Valentine v. Richardt*, 126 N. Y. 272; *Giarratano v. McIlwain*, 215 App. Div. 644, 214 N. Y. Supp. 582.

40. *Harper v. Newburgh*, 159 App. Div. 695, 145 N. Y. Supp. 59; *De Mille Co. v. Casey*, 121 Misc. 78, 201 N. Y. Supp. 20.

41. *Davis v. William Rosenweig Realty Co.*, 192 N. Y. 128; *Diven v.*

Ashbaugh, 121 Misc. 213, 200 N. Y. Supp. 634.

42. *Reynolds v. Westchester F. Ins. Co.*, 8 App. Div. 193, 40 N. Y. Supp. 336.

43. *Reynolds v. Westchester F. Ins. Co.*, 8 App. Div. 193, 40 N. Y. Supp. 336.

44. *Weigel v. Cook*, 237 N. Y. 136.

45. *Becker v. Church*, 115 N. Y. 562.

account for the property received by him and for the income thereof.⁴⁶ This relief may be permitted where the plaintiff has successfully maintained an action for the rescission of a transfer of corporate stocks or bonds.⁴⁷ A person who procures a transfer of property by undue influence is in equity a trustee *ex maleficio* and will be compelled to account.⁴⁸ One who has fraudulently received property may be treated as a trustee and may be compelled to transfer the property or the proceeds so far as they can be traced, and to account for such as cannot be traced.⁴⁹

Where a sale of real property has been accomplished by fraud, the vendee may have a rescission of the transaction, with a personal judgment for any money he may have paid to the vendor; but the courts will not grant him a lien on the real property for such payments.⁵⁰ The plaintiff is not allowed to claim that there was never a valid contract and then secure relief by virtue of the contract. If, however, rescission is granted, not on the ground that the contract is invalid, but because the vendor is unable to perform the contract, the vendee may have a lien for his payments.⁵¹ The same rule may be applied to the rescission of a sale of personal property.⁵²

3. Relief in lieu of rescission.

Equity will administer such relief as the exigencies of the case demand at the close of the trial.⁵³ If the plaintiff had at the time of the commencement of the action a just cause for the rescission of a written instrument, but from subsequent events it appears unnecessary or impracticable to decree such relief, the court will grant such relief as may be

46. *Rudiger v. Coleman*, 199 N. Y. 342; *Buffalo Builders Supply Co. v. Reeb*, 217 App. Div. 190, 217 N. Y. Supp. 497.

47. *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931; *Wood v. Hill*, 214 App. Div. 417, 212 N. Y. Supp. 550. Compare, *Devine v. Kurtz*, 185 App. Div. 679, 173 N. Y. Supp. 730.

48. *Mullin v. Mullin*, 119 App. Div. 521, 104 N. Y. Supp. 323.

49. *Hammond v. Pennock*, 61 N. Y. 145.

50. *Davis v. William Rosenweig Realty Co.*, 192 N. Y. 128; *Kaston v. Zimmerman*, 192 App. Div. 511, 183 N. Y. Supp. 615; *Diven v. Ashbaugh*, 121 Misc. 213, 200 N. Y. Supp. 634.

51. *Elterman v. Hyman*, 192 N. Y. 113; *Flickinger v. Glass*, 222 N. Y. 404.

52. *Giarratano v. McIlwain*, 215 App. Div. 644, 214 N. Y. Supp. 582. See also, *Chisholm v. Eisenhuth*, 69 App. Div. 134, 74 N. Y. Supp. 496.

53. See, *supra*, III-G-1, Relief granted—in general.

necessary to prevent a failure of justice.⁵⁴ Money damages may, in a proper case, be granted in lieu of rescission.⁵⁵ Thus, if the contract has, by its own time limitation, expired before trial, rescission is unnecessary but the court will retain jurisdiction of the action to give such relief as may be proper.⁵⁶ Or, if the defendant has disposed of the property in controversy to a third person who is not a party to the suit, or who is *bona fide* purchaser, a judgment for damages may be granted.⁵⁷ Or, if from the lapse of time restoration to the defendant of the benefits received by the plaintiff has become impossible, the plaintiff may be awarded damages.⁵⁸ But damages in lieu of rescission will not be granted, unless the complaint contains sufficient allegations to support such relief.⁵⁹ And, if the complaint is drawn on the theory of rescission, and no reason is advanced why relief should not be granted on that theory, it may be improper to award money damages in lieu of rescission.⁶⁰

In a case where equity seems to demand relief in unusual form, it may be proper to decree that the instrument be cancelled, unless the damages sustained by the plaintiff be paid.⁶¹ Or, instead of declaring a deed void, the court may direct that it stand as security for a sum due from the defendant to the plaintiff, or in trust for the benefit of the plaintiff.⁶²

4. Relief to defendant.

The decree should contain provisions awarding to the defendant the restoration of the benefits which the plaintiff

54. *Valentine v. Richardt*, 126 N. Y. 272; *Merry Realty Co. v. Shamokin, etc., Co.*, 230 N. Y. 316; *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931; *Wasey v. Holbrook*, 141 App. Div. 336, 125 N. Y. Supp. 1087.

55. *Slayback v. Raymond*, 93 App. Div. 326, 87 N. Y. Supp. 931; *Wasey v. Holbrook*, 141 App. Div. 336, 125 N. Y. Supp. 1087.

56. *Rafferty v. World Film Corp.*, 180 App. Div. 475, 167 N. Y. Supp. 1027.

57. *Valentine v. Richardt*, 126 N. Y. 272; *Daiker v. Strelinger*, 28 App. Div. 220, 50 N. Y. Supp. 1074.

58. *Baker v. Ziegler*, 56 Hun 405, 10 N. Y. Supp. 249, 31 St. Rep. 466.

59. *Joannes Bros. Co. v. Lamborn*, 237 N. Y. 207; *Davis v. Gifford*, 182 App. Div. 99, 169 N. Y. Supp. 492. See also, *Maass v. Rosenthal*, 125 App. Div. 452, 109 N. Y. Supp. 917.

60. *Merry Realty Co. v. Shamokin, etc., Co.*, 230 N. Y. 316.

61. *Hyde Park Terrace Co. v. Jackson Bros. Realty Co.*, 161 App. Div. 699, 146 N. Y. Supp. 1037.

62. *Lange v. Lange*, 185 App. Div. 259, 172 N. Y. Supp. 846; *Dunn v. Chambers*, 4 Barb. 376.

has received from the instrument directed to be cancelled.⁶³ So far as practicable the parties are to be placed *in statu quo*. When a conveyance of real estate is rescinded, the defendant should be repaid the charges upon the property which he paid while holding the title as well as any consideration he may have given for the conveyance.⁶⁴ Payments and charges of this nature may be made a lien on the real estate.⁶⁵ But payments made after the commencement of the action may be at the risk of the defendant.⁶⁶ Contemporary instruments signed by the defendant relating to the same transaction should be cancelled, for equity discountenances a partial rescission.⁶⁷

If the defendant prevails in the action, he may have relief on a counterclaim asking for the enforcement of the instrument in controversy. Thus, in an action to rescind a contract, the defendant may have a decree of specific performance upon the plaintiff's failure to establish his cause of action.⁶⁸ A judgment of foreclosure may be granted to a defendant under similar circumstances.⁶⁹ But, in the absence of a counterclaim, judgment for the defendant should merely

63. See, *supra*, I-F, Restoration of benefits received by plaintiff.

64. *Rudiger v. Coleman*, 199 N. Y. 342; *Faulkner v. Rudell*, 194 App. Div. 810, 185 N. Y. Supp. 706.

65. *Faulkner v. Rudell*, 194 App. Div. 810, 185 N. Y. Supp. 706; *Butler v. Butler*, 93 Misc. 258, 157 N. Y. Supp. 188.

66. *Callanan v. Keeseville, etc., R. Co.*, 199 N. Y. 268. "The right to rescind depends on the situation at the time the action is commenced, and if the right exists then, no subsequent act of the party in default without the consent of the plaintiff can defeat it. When rescission is decreed, the judgment of rescission relates back to the commencement of the action and the rights of the parties depend on the facts as they then existed. Anything done by the party in default toward performance after that date is at his peril, for, as subsequently adjudged, there was then no contract to perform and nothing done could be attributed to

the contract. If complete restitution of benefits conferred by partial performance after suit was brought cannot be had, the party in default has only himself to blame, for acting with full knowledge he could not deprive the plaintiff of what he was lawfully entitled to. Whatever the defendants expended after the commencement of the action was expended with notice that the plaintiff had elected to rescind the contract and had brought an action to effect rescission. With this notice they ran the risk of having any expenditures made after that date restored to them." *Callanan v. Keeseville, etc., R. Co.*, 199 N. Y. 268.

67. *Aronoff v. Levine*, 190 App. Div. 172, 179 N. Y. Supp. 247, affirmed, 232 N. Y. 529. See, *supra*, I-D, Partial rescission.

68. *Masterton v. Beers*, 1 Sweeney (31 Super. Ct.) 406.

69. *Grigsby v. Hubbard*, 217 App. Div. 337, 216 N. Y. Supp. 716.

dismiss the action. A judgment in an action to set aside a mortgage or deed of trust on the ground of duress and abuse of process, no valid counterclaim being interposed, is defective in form where it not only adjudges the validity of the mortgage and dismisses the complaint on the merits, but incorporates a conclusion of law to the effect that "the claims described in the said conveyance in suit are all due and owing with interest as stated therein."⁷⁰

In an action to rescind a mortgage on the ground of payment, it appearing after a considerable controversy that a comparatively small sum is unpaid, the action is not necessarily dismissed, but the decree may direct the cancellation of the mortgage upon payment of such sum, with a provision that in case of a failure to pay such sum within a specified time, the action may be dismissed.⁷¹

5. Costs.

An action for rescission is an equity action which is within the provisions of section 1477 of the Civil Practice Act, and the allowance of costs is within the discretion of the court.⁷² A party guilty of fraud or other wrongful conduct in the procurement of a conveyance, will usually be charged with the costs of the suit.⁷³ Or, in case of the death of the wrongdoer, they may be directed to be paid out of his estate.⁷⁴ But a defendant who did not participate in the wrong will not usually be charged with costs.⁷⁵

Where the action is dismissed as to one defendant on the ground that he was not a proper party to the action, but it was found that he was guilty of fraud, so that it was necessary for him to appeal in order to review the finding of fraud, he will be allowed the costs of the appeal as against the plaintiff.⁷⁶

6. Form of judgment.⁷⁷

(Title.)

The issues in this action having been regularly brought on for trial before Mr. Justice Victor J. Dowling, at a Special Term of the Court, Part III, held on February 27 and 28, 1906, at the County

70. *Bianchi v. Leon*, 218 N. Y. 646.

71. *Beach v. Cooke*, 28 N. Y. 508.

72. *Gleason v. Pease*, 11 Hun, 232.

73. *Prentice v. Achorn*, 2 Paige 30.

74. *Tiffany v. Clark*, 58 N. Y. 632.

75. *Ingersoll v. Cunningham*, 95 App. Div. 571, 88 N. Y. Supp. 711.

76. *Conlon v. Marsh*, 190 App. Div. 396, 180 N. Y. Supp. 204, affirmed without opinion, 232 N. Y. 594.

77. This form is taken from *Davis v. Rosenweig*, 192 N. Y. 128, where an action to rescind a sale of land was successfully maintained.

Court House, in the City of New York, Borough of Manhattan, and the summons in this action having been personally served on all the defendants herein, and the summons and complaint in this action, together with a proper notice of the pendency of this action, having been filed in the Office of the Clerk of the County of New York, on the 25th day of April, 1905, and the Court having heard the allegations and proofs of the parties and the argument of counsel, and, after due deliberation, having duly made and filed on the 26th day of March, 1906, a decision in favor of the plaintiff, against the defendant, The William Rosenzweig Realty Operating Company, in favor of the defendant, William Rosenzweig, which decision contains a statement of the facts found and the conclusions of law thereon, and directs judgment as hereinafter stated; and the plaintiff's costs, including the extra allowance awarded by the Court, having been adjusted at _____ dollars;

Now, on motion of Kurzman & Frankenheimer, attorneys for plaintiff, it is

Adjudged, that the complaint be dismissed as against the defendant William Rosenzweig, but without costs.

It is further adjudged as between the plaintiff herein and the defendant, The William Rosenzweig Realty Operating Company, that the agreement between the plaintiff and the defendant, The William Rosenzweig Realty Operating Company, dated February 23, 1905, and described in the complaint herein, be and the same is hereby rescinded; that the plaintiff recover of the defendant, The William Rosenzweig Realty Operating Company, the sum of five thousand three hundred and thirty-one 64/100 dollars, together with costs of this action adjudged as aforesaid at the sum of three hundred and eight 10/100 dollars, making in the aggregate the sum of fifty-seven hundred and eleven 74/100 dollars. That for the said sum of fifty-seven hundred and eleven 74/100 dollars the plaintiff is hereby declared to have a lien upon the premises described below. That the said defendant The William Rosenzweig Realty Operating Company, and all persons claiming under it, subsequent to the filing of the *lis pendens* herein in the Office of the New York County Clerk, be barred and foreclosed of all right, title, claim, lien, interest and estate in said premises described below; that all the estate, right, title and interest of The William Rosenzweig Realty Operating Company in said premises be sold according to law; that the moneys arising from such sale be brought into court, and that the plaintiff be paid out of the proceeds of such sale the said sum of fifty-seven hundred and eleven 74/100 dollars, together with the expenses of the sale, and that the defendant, The William Rosenzweig Realty Operating Company, pay any deficiency which may remain after applying all of such moneys applicable thereto, together with the costs of this action as taxed.

The following is a description of the premises hereinbefore mentioned:

(Description of premises.)

Any of the parties to this action may apply at the foot of this judgment for such further directions, orders or relief as may be just and proper.

SPECIFIC PERFORMANCE.

ARTICLE I.

Introductory.

	PAGE
A. In general	603
B. Nature of action	604
C. Jurisdiction of courts	604
1. Property in foreign state	604
2. Foreign corporations	605
3. County courts	606
4. Surrogates' courts	606
5. Inferior courts	606
D. Title of parties to executory contract	607
E. Right to specific performance as a defense	608

ARTICLE II.

The Right of Action.

A. In general	609
B. Arbitrations	609
C. Insurance	611
D. Partnership agreements	611
E. Formation of corporation	612
F. Ante-nuptial contracts	612
G. Advance or payment of money	612
H. Services	613
I. Construction contracts	613
J. Miscellaneous contracts	615
K. Contracts relating to real estate	616
1. In general	616
2. Action by vendor	617
3. Leases	618
4. Mortgages	619
5. Conditions	619
6. Lost or defective grant	620
L. Contracts relating to personal property	621
1. In general	621
2. Contract to sell	621
3. Contract to purchase	622
4. Choses in action	623

	PAGE
M. Contracts relating to stocks and bonds.....	623
1. In general	623
2. Action against corporation.....	625
N. Contracts for disposition of property of deceased.....	626
1. In general	626
2. Requirements as to contract.....	627
3. Sufficiency of proof.....	628
4. Parties to contract.....	628
5. Mutual Wills	632
O. Illegal contracts	634
P. Unauthorized contracts	635
Q. Contracts difficult of enforcement.....	637
R. Contracts for continuous acts.....	638
S. Verbal contracts	639
1. In general ..	639
2. Sufficiency of note or memorandum.....	639
3. Fraud	641
4. Effect of "parol evidence" rule.....	644
5. Part performance, in general.....	644
6. Part performance, what constitutes.....	646
7. Part performance, entry into possession, improvements, etc...	647
8. Part performance, payment of consideration.....	650
9. Part performance, services	652
10. Part performance, marriage, separations, etc.....	652
11. Part performance by defendant.....	653
12. Agreement to partition.....	654
13. Agreement to guarantee.....	654
14. Agreement to give or discharge security.....	654
15. Contract for testamentary disposition of property.....	655
16. Pleading of defense.....	655
T. Certainty of contract.....	656
1. In general	656
2. Description of premises.....	657
3. Terms of mortgage or other security.....	658
4. Time of closing title.....	659
5. Terms of lease.....	660
U. Mutuality	660
1. In general	660
2. Meeting of minds of parties.....	661
3. Mutuality of remedy.....	663
4. Unilateral contracts	665
5. Options	666
6. Fraud	668
7. Want of consideration.....	669
8. Contract cancelled	670

	PAGE
V. Impossibility of performance.....	670
1. In general	670
2. Defendant unable to furnish marketable title.....	671
3. Conveyance of property to third person.....	672
4. Performance conditioned on act of third person.....	672
5. Contract partly performable.....	673
6. Performance possible at time of trial.....	673
7. How question raised.....	674
W. Discretion of court.....	675
1. In general	675
2. Relief inequitable	677
3. Mistake, fraud, accident, surprise.....	678
4. Inadequate consideration	680
5. Prejudice to public interests.....	681
6. Fiduciaries, incompetents, infants, etc.....	681
7. Plaintiff not having acted in good faith.....	682
8. Change in circumstances after execution of contract.....	682
9. Laches of plaintiff.....	684
10. Burden of proof.....	684
11. Review by Court of Appeals of discretion of lower court.....	684
X. Adequacy of another remedy.....	685
Y. Performance by plaintiff.....	687
1. In general	687
2. Literal performance not required.....	688
3. When time is of essence.....	688
4. Law day not fixed in contract.....	689
5. Excuses for delay.....	689
6. Extension of time for performance.....	690
7. Place of performance.....	693
8. Variance between description in contract and in deed.....	693
9. Title of vendor not marketable.....	694
a. In general	694
b. When title of vendor unmarketable.....	695
c. Title depending on questions of law.....	697
d. Outstanding incumbrances	699
e. Lis pendens	700
f. Restrictive covenants	701
g. Zoning regulations	701
h. Easements	702
i. Encroachments	702
j. Title from other than vendor.....	703
k. Title by adverse possession.....	703
l. Opinions as to marketability.....	704
m. Waiver of objection to title.....	705
n. Title marketable at time of trial.....	705
10. Payment of purchase price.....	706
11. Title insurance	707
12. Notice of vendor of defect of title or deed.....	707

	PAGE
13. Refusal to accept deed.....	708
14. Tender of performance.....	708
Z. Default of defendant.....	710
AA. Premises of infants or incompetents.....	711
1. Civil Practice Act, § 1384. Jurisdiction of supreme court over contracts of incompetents.....	711
2. Civil Practice Act, § 1385. Action to compel conveyance.....	711
3. Civil Practice Act, § 1386. Who may maintain action.....	712
4. Civil Practice Act, § 1387. Judgment; effect thereof.....	712

ARTICLE III.

Procedure.

A. Parties to action.....	712
1. Plaintiffs generally	712
2. Defendants generally	713
3. Personal representative of vendor.....	715
4. Personal representative of vendee.....	715
5. Heirs, devisees	716
6. Grantee	717
7. Assignee of vendee.....	718
8. Wife or widow.....	720
10. Purchaser at judicial sale.....	721
B. Pleadings	721
1. Essential allegations of complaint.....	721
2. Performance by plaintiff.....	722
3. Authority of agent signing contract.....	723
4. Absence of adequate remedy at law.....	723
5. Matters relating to alternative relief.....	724
6. Prayer for relief.....	724
7. Variances and amendments.....	725
8. Joinder of causes of action.....	726
9. Bill of particulars.....	726
10. Form of complaint in an action by vendor of real estate.....	727
11. Another form in action by vendor.....	728
12. Form of complaint in action to compel performance of contract relating to testamentary disposition of property.....	729
13. Form of complaint in action to compel transfer of stock.....	732
C. Lis pendens	733
D. Temporary injunction	734
E. Place of trial.....	735
F. Jury trial	735
G. Submission of controversy.....	736
H. Limitation of action; laches.....	737
1. Statute applicable	737
2. When cause of action accrues.....	738
3. Laches	738

	PAGE
I. Appeals	740
1. Civil Practice Act, § 586. Rights of parties after appeal from judgment in favor of owner in certain real property actions..	740
2. Civil Practice Act, § 597. Security to stay execution on judgment or order directing conveyance.....	740
3. Effect of statutes.....	741
4. Action of appellate court.....	741

ARTICLE IV.

Relief Granted.

A. In general	742
B. Directions as to specific performance.....	743
1. In general	743
2. Form of deed.....	744
3. Performance by infants or incompetents.....	745
4. Allowance of offsets against purchase price.....	746
5. Payment or assumption of incumbrances.....	746
6. Partial performance.....	747
C. Incidental relief	748
D. Specific performance as incidental relief in another form of action...	749
E. Rescission of contract on denial of relief.....	749
F. Damages in lieu of specific performance.....	749
1. In general	749
2. Impossibility of performance.....	751
3. Jury trial of issues.....	752
4. Pleading and proof of legal cause of action.....	753
5. Amount of damages.....	754
6. Recovery of deposit by purchaser.....	755
7. Lien for damages or deposit.....	756
G. Abatement of purchase price.....	757
1. In suit by purchaser.....	757
2. In suit by vendor.....	758
H. Accounting for damages sustained from delay.....	759
1. In general	759
2. Value of use and occupancy.....	760
3. Interest to vendor.....	761
4. Interest to purchaser.....	762
5. Depreciation in property.....	762
6. Accounting by purchaser for use of premises.....	763
7. Accounting for proceeds of sale to third person.....	763
I. Judicial sale	763
J. Injunction	764
K. Vendor's wife refusing to sign deed.....	764
L. Enforcement of decree.....	766
M. Modification of decree.....	767
N. Costs	767

	PAGE
O. Forms of judgments.....	769
1. Judgment in action by vendor of real estate.....	769
2. Another form in action by vendor.....	771
3. Action to enforce agreement for testamentary disposition.....	772
4. Action to compel transfer of stock.....	773

A. In general.

Specific Performance is an equitable remedy for the enforcement of the equitable duties arising out of an agreement.¹ The remedy is a well recognized branch of equity jurisprudence.² Its value in the administration of the law lies in the fact that a party in default can be compelled to do those acts which he has agreed to do. In actions at law, one can avoid his duty of performing contracted acts by the payment of money damages; but in equity a more satisfactory remedy may many times be secured through a decree requiring the defaulting party literally to carry out his agreement. That every individual should fulfil his contract, so long as the power to do so remains with him, must be admitted to be a moral obligation. According to the established forms of the common law, there was no remedy afforded in case of a breach of contract, except in the nature of pecuniary damages for the wrong sustained. This mode of redress was at an early period of the law found to be defective, and in many cases wholly inadequate; hence the Court of Chancery, possessing more complete control over parties, and moulding its decrees to the particular circumstances before it, acquired, at an early day, jurisdiction of this class of cases, and afforded relief in cases where the common law failed.³ Theoretically, its exercise depends upon the failure of the courts of law to give an adequate remedy for a breach of a contract; but, as a practical proposition, equitable jurisdiction is exercised in some cases when it is apparent that money damages afford a sufficient remedy. As to contracts relating to personal property, the courts consistently adhere to the rule that equity cannot be invoked when an adequate remedy at law exists.⁴ But the peculiar

1. *Smith v. Bradhurst*, 18 Misc. 546, 41 N. Y. Supp. 1002.

2. *Maury v. Post*, 55 Hun 454, 3 N. Y. Supp. 714, 29 St. Rep. 827.

3. *Slocum v. Closson*, 1 How. App. Cas. 705, 751, 758.

4. See, *infra*, II-L, Contracts relating to personal property.

sanctity which has surrounded real estate seems to have extended the powers of courts of equity over that class of property. Hence, a contract for the conveyance of a parcel of real estate may be enforced in an action of specific performance, and the courts do not pause to consider whether legal remedies are sufficient for the purposes of the complaining party. Clearly this is justifiable when exercised in behalf of the purchaser, for only one parcel of land can occupy the same geographical position, and money damages may be poor substitute for a desire to own particular premises. But some difficulty is to be experienced in justifying the relaxation of the rule in cases where the seller seeks to compel the purchaser to perform the contract. In such an action the plaintiff is seeking merely the acceptance of the deed and the payment of the consideration, and money damages frequently would do complete justice. Yet the courts grant the specific performance almost as a matter of course, provided the agreement is in other respects one which meets the approval of equitable courts.⁵

Specific performance may be secured indirectly in an action for an injunction. That is, the court may enjoin a violation of a breach of the contract. While the same equitable principles apply, as a general proposition, to both Specific Performance and Injunction, the remedies are distinct.⁶

In an action of specific performance, the court does not undertake to write a new contract for the parties, or to change one already made.⁷ If the parties have made a contract, but it is not expressed correctly, the remedy is an action of Reformation.⁸ If the contract is invalid, as through fraud or other circumstance, the remedy is an action to have the agreement rescinded.⁹

B. Nature of action.

An action of specific performance is frequently brought by the vendor of real estate for the purpose of procuring a judicial determination of the title to the property. Never-

5. See, *supra*, II-K, Contracts relating to real estate.*

6. *Niagara Falls, etc., Bridge Co. v. Great Western R. Co.*, 39 Barb. 212. And see the chapter on Injunction.

7. *Stoddard v. Stoddard*, 227 N. Y.

13; *Leggett v. Edwards*, Hopk. Ch. 530.

8. See the chapter on Reformation.

9. *Tallman v. Green*, 3 Sandf. (5 Super. Ct.) 437. And see the chapter on Rescission.

theless, from a legal point of view, the action is not classed as an action "to determine title," but is considered as an action for the enforcement of a personal contract.¹⁰ In passing upon the title to the property, the court is determining a question which is incidental to the main purpose of the suit. Thus, it has been held that the action is not one "to affect the title to real property," within the meaning of that expression as used in subdivision 3 of section 47 of the General Corporation Law relating to the jurisdiction of actions against foreign corporations.¹¹ Nor is the action one to "compel the determination of a claim to real property," within the meaning of section 1512 of the Civil Practice Act relating to additional allowances.¹²

A suit for specific performance is of a twofold character, partly *in personam* and partly *in rem*. The court may enforce the contract either by operating upon the person to compel a conveyance, or may pass the title by decree.¹³

C. Jurisdiction of courts.

1. Property in foreign state.

Prior to 1913, it was established that the courts of this State would not entertain jurisdiction of an action for injuries to real estate situated in another State,¹⁴ but, nevertheless, an action for the specific performance of a contract for the conveyance of real estate situated in another State could be prosecuted, if the courts had jurisdiction of the person of the defendant.¹⁵ The Supreme Court may compel

10. *Wrightsville Hardware Co. v. Assets Realization Co.*, 159 App. Div. 849, 144 N. Y. Supp. 991.

11. *Wrightsville Hardware Co. v. Assets Realization Co.*, 159 App. Div. 849, 144 N. Y. Supp. 991.

12. *Brisach v. Vosseler*, 111 Misc. 424, 181 N. Y. Supp. 571.

13. *Garfein v. McInnes*, 248 N. Y. 261; *Korminsky v. Korminsky*, 2 Misc. 138, 21 N. Y. Supp. 611.

14. **Change in 1913.**—In 1913, section 982a of the Code of Civil Procedure was added and has materially changed the jurisdiction of the courts of this state in reference to real estate situated in other states. This statute

is now consolidated in section 536 of the Real Property Law and is as follows: "An action may be maintained in the courts of this state to recover damages for injuries to real estate situate without the state, or for breach of contracts or of covenants relating thereto, whenever such an action could be maintained in relation to personal property without the state. The action must be tried in the county in which the parties or some one thereof resides, or if no party resides within the state, in any county."

15. *Garfein v. McInnes*, 248 N. Y. 261; *Cleveland v. Burrill*, 25 Barb. 532; *Sutphen v. Fowler*, 9 Paige 280.

the specific performance by a resident of this State of a contract for the conveyance of land without its jurisdiction.¹⁶ If service of process is made on the defendant so that he is subjected to the jurisdiction of the court, he may be required to perform the contract whether the action is maintained by the vendor or vendee of the property.¹⁷ An action to compel one to convey real property situated within the State, is within sections 232 and 235 of the Civil Practice Act and hence process may be served on a non-resident by publication or personally without the State.¹⁸

2. Foreign corporations.

Actions of specific performance may be maintained against foreign corporations. Section 46 of the General Corporation Law permits the action when maintained by a domestic corporation or a resident of the State; and section 47 permits an action by a non-resident or another foreign corporation when the property involved is situated within the State.¹⁹ And, though the real estate contracted to be conveyed is located in another State, the courts of this State will entertain the action, "where the cause of action arose within the State."²⁰ But, ordinarily, the courts of this State will be unable to make a decree for specific performance against a foreign corporation in behalf of a non-resident, where the property involved is also situated in another State.²¹ And, if the judgment would require interference with the internal

A non-resident testamentary trustee may be compelled to perform a contract for the sale of real estate in the state. *Meaney v. Way*, 108 App. Div. 290, 95 N. Y. Supp. 745.

Official Survey of Premises Required.—Specific performance cannot be granted if the contract requires the defendant to go to a foreign country where the property is situated and procure an official survey of the premises, legal proceedings being required in such country to procure an official survey. The court, not being able to control the proceedings in such country, will not require the defendant to institute and control them. *Cuban Production Co. v. Rodriguez*, 124 App. Div. 363, 108 N. Y. Supp. 785.

16. *Newton v. Bronson*, 13 N. Y. 587; *Garfein v. McInnes*, 248 N. Y. 261; *Rochester & Kettle Falls Land Co. v. Roe*, 8 App. Div. 360, 40 N. Y. Supp. 799, 75 St. Rep. 179.

17. *Cleveland v. Burrill*, 25 Barb. 532.

18. *Garfein v. McInnes*, 248 N. Y. 261.

19. See *Davidson v. Cannabis Mfg. Co.*, 113 App. Div. 664, 99 N. Y. Supp. 1018, appeal dismissed, 187 N. Y. 576.

20. *Wrightsville Hardware Co. v. Assets Realization Co.*, 159 App. Div. 849, 144 N. Y. Supp. 991.

21. *Johnson v. Victoria Chief Copper Co.*, 65 Misc. 332, 119 N. Y. Supp. 639.

affairs of a foreign corporation, generally no relief can be procured in this State.²²

3. County courts.

Under the express provisions of section 67 of the Civil Practice Act, the jurisdiction of each County Court extends to an action "to procure a judgment requiring a specific performance of a contract, relating to real property; where the real property, to which the action relates, is situated within the county."²³ This grant of jurisdiction is within the constitutional authority of the Legislature.²⁴ And, in an action of this character, maintained by the vendor of the property, the County Court may insert a provision barring the vendee of all equity of redemption in the premises.²⁵

4. Surrogates' courts.

While an action of specific performance is entirely without the jurisdiction of a probate court, section 40 of the Surrogate's Court Act does invest a surrogate with limited equitable powers. When an equitable question is involved in a proceeding before him, he can determine it and can make an equitable disposition of the matter by such order or decree as justice requires. This apparently permits a surrogate, in a proper case, to require a party in a proceeding before him to perform a prescribed act, and such power, while technically not to be classed as a remedy by specific performance, may reach a similar result. Thus, it has been held, where a separation agreement made specific provision for the payment of one-half of the husband's interest in a trust fund for the support and maintenance of the wife, an application by her for the payment to her of her share can be entertained by a surrogate, and a decree can be made directing such payment to her.²⁶

5. Inferior courts.

Very limited equitable powers are given to local inferior courts,²⁷ and hence city courts, municipal courts, and justices

22. *Fisher v. Charter Oak L. Ins. Co.*, 20 Jones & S. (52 Super. Ct.) 179.

23. *Andrews v. Horton*, 66 Misc. 66, 120 N. Y. Supp. 431; *Adams v. Ash*, 46 Hun 105, 11 St. Rep. 618.

24. *Williston v. Williston*, 41 Barb. 635.

25. *Adams v. Ash*, 46 Hun 105, 11 St. Rep. 618.

26. *Matter of Yard*, 116 Misc. 19, 189 N. Y. Supp. 190.

27. The Superior Court of New York City, before its abolition, had jurisdiction of actions of specific perform-

of the peace have no power to direct the specific performance of a contract.²⁸ If an action at law on a contract is commenced in the Municipal Court of New York City, and the defendant desires to litigate an issue of specific performance of the contract, it is proper practice for him to commence an action for that purpose in the Supreme Court, and the latter court may stay the action at law, if all the issues can be determined in the Supreme Court.²⁹

D. Title of parties to executory contract.

The interest of a vendee under an executory contract of sale of real property is deemed real estate;³⁰ and in case of his death, it descends to his heirs at law.³¹ The vendor is deemed in equity to be the trustee of the title for the vendee.³² The money due on the contract is treated as the personal estate of the vendor; and, in case of his death, it passes to the executor or administrator of his estate, and does not descend to his heirs.³³ The contract may be sold by the personal representative of the vendor as a personal effect of the estate.³⁴ The contract constitutes an equitable conversion of the realty into personalty.³⁵ It was formerly held that the heirs of the vendee could call upon his representative to discharge the contract out of the personal estate of the deceased, so as to enable the heirs to demand a conveyance from the vendor.³⁶ It is possible that section 250 of the Real Property Law may have changed this rule.

ance. *Bowen v. Irish Presbyterian Congregation*, 6 Bosw. (19 Super. Ct.) 245.

28. *Roedmann v. Hertel*, 78 Misc. 55, 138 N. Y. Supp. 375.

29. *Corn v. Suderov*, 160 App. Div. 916, 145 N. Y. Supp. 527.

30. *Hathaway v. Payne*, 34 N. Y. 92; *Holly v. Hirsch*, 135 N. Y. 590; *Williams v. Haddock*, 145 N. Y. 144; *Moore v. Burrows*, 34 Barb. 173; *Williams v. Kierney*, 6 St. Rep. 560.

31. *Hathaway v. Payne*, 34 N. Y. 92; *Williams v. Haddock*, 145 N. Y. 144; *Klapp v. Dealy*, 213 App. Div. 523, 211 N. Y. Supp. 22; *Swartout v. Burr*, 1 Barb. 495; *Moore v. Burrows*, 34 Barb. 173; *Champion v. Brown*, 6

Johns. Ch. 398; *Williams v. Kierney*, 6 St. Rep. 560.

32. *Hathaway v. Payne*, 34 N. Y. 92; *Holly v. Hirsch*, 135 N. Y. 590; *Williams v. Haddock*, 145 N. Y. 144; *Swartout v. Burr*, 1 Barb. 495.

33. *Hathaway v. Payne*, 34 N. Y. 92; *Holly v. Hirsch*, 135 N. Y. 590; *Williams v. Haddock*, 145 N. Y. 144; *Klapp v. Dealy*, 213 App. Div. 523, 211 N. Y. Supp. 22; *Swartout v. Burr*, 1 Barb. 495; *Moore v. Burrows*, 34 Barb. 173.

34. *Moore v. Burrows*, 34 Barb. 173.

35. *Williams v. Haddock*, 145 N. Y. 144.

36. *Champion v. Brown*, 6 *Johns. Ch.* 398; *Williams v. Kierney*, 6 St. Rep. 560.

E. Right to specific performance as a defense.

Under the modern practice, a party may interpose an equitable cause of action for specific performance, as a defense or counterclaim to an action at law. Thus, the contract vendor may interpose a defense or a counterclaim for specific performance in an action by the purchaser to recover his part payments,³⁷ and, in such a case, the defendant can succeed if he is able to make a good title to the premises before the decree is rendered.³⁸ The alleged purchaser may interpose a claim for specific performance in an action by his alleged vendor for ejectment,³⁹ or in an action by the vendor for trespass or waste on the premises,⁴⁰ or in an action by one of the heirs of the vendor for the partition of the premises.⁴¹ If one of the parties brings an action for rescission of a contract, the defendant, if the validity of the contract is sustained, may have judgment for the specific performance thereof.⁴²

When the owner seeks to remove a contract purchaser by summary proceedings, if the proceeding is before an inferior magistrate or court, the equitable right of the purchaser may afford a defense to the proceeding, but he may be unable to secure affirmative relief in the form of specific performance.⁴³

When an equitable counterclaim is interposed to an action at law, the defendant is entitled to have his counterclaim

37. *Weinheimer v. Ross*, 205 N. Y. 518; *Epstein v. Rockville Center Imp. Co.*, 164 App. Div. 177, 149 N. Y. Supp. 638; *Kappelmeier v. Newton Garage*, 221 App. Div. 564, 224 N. Y. Supp. 623.

Waiver of counterclaim.—A vendor who has been sued by the purchaser for the recovery of "earnest" money, waives a counterclaim for specific performance if he conveys the premises to a third person after the commencement of the action. *Groden v. Jacobson*, 129 App. Div. 508, 114 N. Y. Supp. 183.

38. *Weinheimer v. Ross*, 205 N. Y. 518; *Weinheimer v. Ross*, 80 Misc. 269, 141 N. Y. Supp. 56, affirmed, 162 App.

Div. 926, 148 N. Y. Supp. 1150, modified, 162 App. Div. 933, 148 N. Y. Supp. 1150, affirmed, 214 N. Y. 630.

39. *McCray v. McCray*, 30 Barb. 633; *Traphagen v. Traphagen*, 40 Barb. 537; *Helmke v. N. J. & N. Y. Co.*, 21 N. Y. Supp. 345, 49 St. Rep. 361, affirmed without opinion, 60 St. Rep. 874.

40. *Lazarus v. Heilman*, 11 Abb. N. C. 93, 2 Civ. Proc. 204; *Burgett v. Bissell*, 14 Barb. 638.

41. *Godine v. Kidd*, 64 Hun 585, 29 Abb. N. C. 36, 19 N. Y. Supp. 335, 46 St. Rep. 813.

42. *Masterton v. Beers*, 1 Sweeny (31 Super. Ct.) 406.

43. *Roedmann v. Hertel*, 78 Misc. 55, 138 N. Y. Supp. 375.

tried at Special Term under section 424 of the Civil Practice Act.⁴⁴

ARTICLE II.

THE RIGHT OF ACTION.

A. In general.

Specific performance of a contract will not be adjudged unless the contract is a valid subsisting agreement,⁴⁵ founded upon a sufficient consideration,⁴⁶ mutually binding upon the parties,⁴⁷ expressed with reasonable certainty,⁴⁸ and possible of performance.⁴⁹ These requirements are absolute, and in the absence of any, the relief must be denied. Moreover, the court may, in the exercise of its discretion, refuse the remedy of specific performance and leave the parties to their rights at law, when the contract will work a hardship or cause injustice.⁵⁰

B. Arbitrations.

Prior to the enactment of the Arbitration Law in 1920, it was well established that an agreement to arbitrate disputed matters was not an agreement which could be specifically performed by the courts.⁵¹ The present Arbitration Law provides for a special proceeding in which an agreement to arbitrate may be compelled by an order of the court. While the result reached is analogous to the end accomplished in an equitable action of specific performance, the distinction between the remedies is to be maintained. The remedy given by the Arbitration Law is a special proceeding created by statute; the remedy by specific performance is an action developed by courts of equity jurisdiction.

The reason for the denial of the specific performance of an arbitration agreement was found in the right of a party to revoke an arbitration at any time before the making of an award. The right to specific performance directly inter-

44. *Epstein v. Rockville Center Imp. Co.*, 164 App. Div. 177, 149 N. Y. Supp. 638.

45. See, *infra*, II-O, Illegal contracts; II-P, Unauthorized contracts; II-S, Verbal contracts.

46. See, *infra*, II-U-7, Want of consideration.

47. See, *infra*, II-U, Mutuality.

48. See, *infra*, II-T, Certainty of contract.

49. See, *infra*, II-V, Impossibility of performance.

50. See, *infra*, II-W, Discretion of court.

51. *Greason v. Kettletas*, 17 N. Y. 491. See also, *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488; *Johnston v.*

ferred with the right of revocation, and the latter right predominated. Another reason for refusal of equity in such cases was found in the difficulty in enforcing the decree, for an unwilling party could repeatedly nominate an appraiser who could refuse to act, and in this manner could avoid the decree.⁵² The Legislature has abolished the reason for the rule, by denying the right to revoke an arbitration; but, having furnished an adequate remedy, there is no necessity for a resort to equity. Prior to the enactment of the Arbitration Law, it was held that, after an award had been made pursuant to an agreement of arbitration, the court could adjudge the specific performance of the award.⁵³ Thus, if parties agreed that the compensation for the transfer of certain real estate would be determined by appraisers, after the appraisers fixed the amount, the court could direct its payment.⁵⁴ Moreover, if the agreement for an appraisal was so framed that appraisers could be appointed without the approval of a party, the reason for the rule did not apply with so much force, and the action might be successful.⁵⁵ And parties having several matters in dispute could agree that judgments should not be entered upon the awards, but that one award should be offset against another, and a judgment entered for the difference only, and such an agreement could be enforced by a court of equity.⁵⁶

In a number of decisions, the court has said that parties could be required to make an appraisal of property through arbitrators and thus determine its value or rental value. Thus jurisdiction has sometimes been exercised when the appraisal is more or less incidental to the main purpose of the action, as when it is sought to enforce a covenant for a renewal of a lease at a rental to be fixed by appraisers, or when a tenant of premises has exercised an option to purchase the premises at the termination of his lease at a consideration to be likewise fixed.⁵⁷

Martin, 10 Misc. 399, 31 N. Y. Supp. 34, 63 St. Rep. 424.

52. Greason v. Kettletas, 17 N. Y. 491.

53. Bouck v. Wilber, 4 Johns. Ch. 405. See also, Johnston v. Martin, 10 Misc. 399, 31 N. Y. Supp. 34, 63 St. Rep. 424.

54. Maury v. Post, 55 Hun 454, 8 N. Y. Supp. 714, 29 St. Rep. 827.

55. Smith v. St. Philip's Church, 107 N. Y. 610.

56. Webb v. Parker, 130 App. Div. 92, 114 N. Y. Supp. 489.

57. Mutual Life Ins. Co. v. Stephens, 214 N. Y. 488; Johnson v. Conger, 14 Abb. Pr. 195; Dunnell v. Keteltas, 16 Abb. Pr. 205, affirmed without opinion, 26 How. Pr. 599; Kelso v. Kelly, 1 Daly 419.

C. Insurance.

When an agreement to insure certain property is consummated to the extent that nothing remains to be done except for the insurer to deliver the policy, and he refuses to do this, an action in equity by way of specific performance may be maintained to compel the delivery of the policy.⁵⁸ Obviously, until a loss has been sustained, damages at law will afford the assured no remedy for the failure of the insurer to perform his agreement.⁵⁹ In case of a loss before the commencement of the action, the court may also decree the payment of the sum due the assured.⁶⁰ The court may direct a life insurance company to deliver a policy insuring the life of a certain person, where it has made a binding agreement to execute such a policy.⁶¹

D. Partnership agreements.

Where a partnership agreement is for a definite period, it is said that one party may have relief to compel the specific performance of the agreement to the extent of compelling the execution of the partnership articles, or the transfer of the property where there has been a part performance, or to restrain a partner from carrying on business under the partnership name with other persons, or from publishing notices of dissolution.⁶² But, if the partnership agreement is not for a definite period, it is dissoluble at the will of any of the partners. Therefore, specific performance of a contract to enter into a partnership or to carry out such a partnership agreement already in existence cannot be decreed.⁶³

58. *Chase v. Washington Mut. Ins. Co.*, 12 Barb. 595; *Rhodes v. Rail Pass. Ins. Co.*, 5 Lans. 71; *Carpenter v. Mut. Safety Ins. Co.*, 4 Sandf. Ch. 408. See also, *Perkins v. Washington Ins. Co.*, 4 Cow. 645, reversing, 6 Johns. Ch. 485.

59. *Carpenter v. Mut. Safety Ins. Co.*, 4 Sandf. Ch. 408.

60. *Rhodes v. Rail Pass. Ins. Co.*, 5 Lans. 71; *Carpenter v. Mut. Safety Ins. Co.*, 4 Sandf. Ch. 408.

61. *Wilcox v. Equitable Life Assur. Soc.*, 173 N. Y. 50; *Lindenthal v. Germania L. Ins. Co.*, 174 N. Y. 76.

62. *Hart v. Hart*, 188 App. Div. 283, 176 N. Y. Supp. 790; *Wilcox v. Williams*, 92 Hun 250, 36 N. Y. Supp. 944.

Compelling Sale of Assets.—Where a partnership agreement provided for the sale of certain property of the firm on its dissolution it was held that a court of equity could enforce the clause and compel a sale. *Comstock v. White*, 31 Barb. 301.

63. *Hart v. Hart*, 188 App. Div. 283, 176 N. Y. Supp. 790; *Wilcox v. Williams*, 92 Hun 250, 36 N. Y. Supp. 944; *Goldberg v. Kirschstein*, 36 Misc. 249, 73 N. Y. Supp. 358.

E. Formation of corporation.

Equitable relief will not be extended so as to compel persons to perform an agreement to organize a corporation. Particularly is this true, when the parties are hostile and cannot agree upon the terms for the formation of the corporation,⁶⁴ or when the agreement provides that the plaintiff shall be an officer of the corporation. The selection of corporate officers is a duty of the stockholders, not a privilege of courts of equity.⁶⁵ Nor will an injunction issue to restrain the defendants from forming another corporation, although the defendants are thereby breaching their contract.⁶⁶

F. Ante-nuptial contracts.

Ante-nuptial contracts are favored by the courts, and are enforced by courts of equity. In many cases, it will be found that an action of specific performance is an appropriate remedy for the enforcement of such a contract.⁶⁷ Particularly is this true, when the contract requires the conveyance of real property in consideration of the marriage. The action may be maintained though it involves the testamentary disposition of the property of the promisor.⁶⁸

G. Advance or payment of money.

As a general rule, an action of specific performance is not maintained to compel a party to fulfill a promise to advance or pay money.⁶⁹ An adequate remedy can generally be

64. *Rudiger v. Coleman*, 112 App. Div. 279, 98 N. Y. Supp. 461.

65. *Perrin v. Smith*, 135 App. Div. 127, 119 N. Y. Supp. 990, affirming, 64 Misc. 289, 118 N. Y. Supp. 551.

66. *Perrin v. Smith*, 135 App. Div. 127, 119 N. Y. Supp. 990, affirming, 64 Misc. 289, 118 N. Y. Supp. 551. See also, the Chapter on Injunctions.

67. *Phalen v. United States Trust Co.*, 186 N. Y. 178; *White v. White*, 20 App. Div. 560, 47 N. Y. Supp. 273.

68. *Phalen v. United States Trust Co.*, 186 N. Y. 178. See also, *infra*, II-N, Contracts for disposition of property of deceased.

69. *Bradford, Eldred, etc., R. I. Co. v. New York, etc., R. Co.*, 123 N. Y.

316; *Thompson v. Thompson*, 178 App. Div. 610, 165 N. Y. Supp. 892; *Williams v. Boyle*, 1 Misc. 364, 20 N. Y. Supp. 720, 48 St. Rep. 713; *Morgens-tern v. Burkhardt*, 9 Misc. 417, 30 N. Y. Supp. 190, 61 St. Rep. 701.

Transfer of Property.—Specific performance may be decreed of an agreement by the defendant to pay the plaintiff a sum of money and transfer to her one-half his property in consideration of the discontinuance of divorce proceedings by her against him and her returning to and living with him, and an accounting may be ordered to carry the decree into effect. *Hart v. Hart*, 188 App. Div. 283, 176 N. Y. Supp. 790.

enjoyed in legal actions, if the only relief asked is the payment of money. Thus, relief by way of specific performance has been denied to a wife seeking to enforce the provisions of a separation agreement providing for the payment of monthly sums.⁷⁰ To the general rule, one notable exception is made. An action of specific performance may be maintained by the vendor of real estate, when practically the only relief desired is that the vendee pay the purchase price.⁷¹

H. Services.

Generally speaking, a court of equity will not decree the specific performance of a contract for personal services.⁷² Thus, the contract by an actor or concert singer for public performances will not be specifically performed.⁷³ The refusal of relief is based on the difficulty, if not the utter impossibility, of satisfactorily compelling the performance of the agreement.⁷⁴ Nor, as a general rule, will equity indirectly accomplish the same result as by enjoining performances for a rival producer.⁷⁵ But, if the services are of an exceptional nature, equity will enjoin an employee from working for a rival, and the relief granted may be as efficacious as that of specific performance.⁷⁶

I. Construction contracts.

Owing to the difficulty of effective control, the courts will seldom undertake the supervision of building contracts.⁷⁷ Hence, as a general rule, the specific performance of a con-

Payment in Coin.—At a time when paper money was valued under par, it was held that a contract to pay money in gold or silver coin would not be specifically performed. *Wilson v. Morgan*, 4 Rob. 53, 1 Abb. Pr. (N. S.) 174, 30 How. Pr. 386.

70. *Thompson v. Thompson*, 178 App. Div. 610, 165 N. Y. Supp. 892.

71. See, *infra*, II-K, Contracts Relating to Real Estate.

72. Maintenance of action.—The remedy of specific performance has been denied certain of the heirs of Annetje Jans on an agreement of the defendants to prosecute an action against the Trinity Church for the recovery of

Jans lands. *Teller v. VanDeusen*, 3 Paige 33.

73. *Mapleson v. Del Puente*, 13 Abb. N. C. 144; *Sanquirico v. Benedetti*, 1 Barb. 315; *Hamblin v. Dinneford*, 2 Edw. Ch. 529. See also, *DeRivafinoli v. Corsetti*, 4 Paige 264.

74. *Sanquirico v. Benedetti*, 1 Barb. 315.

75. *Sanquirico v. Benedetti*, 1 Barb. 315; *Hamblin v. Dinneford*, 2 Edw. Ch. 529.

76. See, the Chapter on Injunctions.

77. *Backes v. Curran*, 36 Misc. 492, 73 N. Y. Supp. 937, reversed on other grounds, 69 App. Div. 188, 74 N. Y. Supp. 723.

tract to build, rebuild or repair a structure will not be decreed.⁷⁸ The refusal of equity to interfere may be sustained also on the ground that there is an adequate remedy at law for the damages sustained by the complaining party.⁷⁹ This is clear where the contract gives him the right to make the repairs or construction and charge the expense to his opponent. If the work is to be done in another State or country, an additional reason is thereby afforded for declining equity jurisdiction.⁸⁰ In some cases, however, where there is no remedy by way of damages, courts of equity have decreed specific performance. As was said in one case,⁸¹ "There is no universal rule that courts of equity never will enforce a contract which requires some building to be done. They have enforced such contracts from earliest days to the present time." Thus, a contract for the construction of a

78. *Beck v. Allison*, 56 N. Y. 366; *Backes v. Curran*, 36 Misc. 492, 73 N. Y. Supp. 937, reversed on other grounds, 69 App. Div. 183, 74 N. Y. Supp. 723.

Explanation of rule.—"How can a specific performance of things of this kind be decreed? The nature of the thing shows the absurdity of drawing these questions from their proper trial and jurisdiction. These reasons apply with all their force to an attempt to enforce the specific performance of the contract in question. The court must first adjudge what repairs are to be made and the time within which they are to be done. When this is accomplished more serious difficulties remain. The idea that the court can appoint a receiver to take possession of the property and cause the work to be done, with money furnished by the defendant, would be, in the language of Lord Worthington, absurd. The mode, if undertaken, must be for the court first specifically to determine what shall be done, and when and how and then to enforce performance by attachment, as for contempt in case of alleged disobedience. Then will arise, not only the question, whether there has been substantial performance, and

if found not, whether the defendant had any such excuse therefor as will exonerate him from the contempt charged, and in case of performance, but not in as beneficial a manner as adjudged, the compensation that should be made for the deficiency. It is obvious that the execution of contracts of this description, under the supervision and control of the court, would be found very difficult if not impracticable, while the remedy at law would, in nearly, if not in all cases, afford full redress for the injury. It is for these reasons that such powers have never been exercised in this country." *Beck v. Allison*, 56 N. Y. 366.

Fence.—An agreement to reset a fence will not be specifically performed. *Rosenberg v. Wilson*, 120 App. Div. 554, 104 N. Y. Supp. 1087, affirmed without opinion, 189 N. Y. 545.

79. *Valloton v. Seignett*, 2 Abb. Pr. 121.

80. *Breeden v. Hopkins*, 210 App. Div. 412, 206 N. Y. Supp. 282.

81. *Strauss v. Estates of Long Beach*, 187 App. Div. 876, 176 N. Y. Supp. 447, reversing, 105 Misc. 398, 173 N. Y. Supp. 142.

sewer, where the violation created a nuisance, has been specifically performed.⁸² If the covenant is for the construction of buildings on the lands of the promisor, there may be an absence of a remedy at law, and hence the covenant may be enforced in equity.⁸³

In the early history of railroad construction, before such matters were regulated by the Interstate Commerce Commission or a state public utility commission, a clause in a right of way agreement providing for the erection of structures by the railroad for the benefit of the owner whose lands were ceded, was sometimes enforced specifically. An agreement for a bridge or other crossing over the railroad lands has been enforced.⁸⁴ Courts of equity have also aided an agreement for the erection of a station at a specified location.⁸⁵ Likewise a decree has been made requiring a railroad to perform a covenant for the building of a fence between its lands and the lands of an adjoining owner.⁸⁶ Similarly, a statutory duty to maintain fences may be specifically enforced.⁸⁷

J. Miscellaneous contracts.

Various contracts, not readily subject to classification, have successfully formed the basis for an action of specific

82. *Strauss v. Estates of Long Beach*, 187 App. Div. 876, 176 N. Y. Supp. 447, reversing, 105 Misc. 398, 173 N. Y. Supp. 142.

83. *Stuyvesant v. Mayor, etc., of N. Y.*, 11 Paige 414.

84. *Post v. West Shore R. Co.*, 123 N. Y. 580; *Aiken v. Albany, etc., R. Co.*, 26 Barb. 289; *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun 467. (Holding that a railroad could be required to build a bridge although the contract did not specify the size of the bridge or the materials of which it was to be constructed.)

Remedy refused, when the construction of the crossing would be onerous to the railroad and of no substantial utility to the adjoining owner. *Murdefeldt v. New York, etc., R. Co.*, 20 Week. Dig. 534, affirmed, 102 N. Y. 703, 1 Silv. Ct. App. 93.

Damages, in lieu of specific per-

formance, may, in the discretion of the court, be awarded. *Wademan v. Albany & Susquehanna R. Co.*, 51 N. Y. 568. See also, *Clarke v. Rochester, etc., R. Co.*, 18 Barb. 350.

85. *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun 467.

A change of circumstances, which makes it more onerous for the railroad to establish a station at a particular place, and its establishment is of no great benefit to the complaining party, may induce the court to refuse the remedy in a particular case. *Conger v. New York, etc., R. Co.*, 45 Hun 296, 10 St. Rep. 392, affirmed, 120 N. Y. 29.

86. *Countryman v. Deck*, 13 Abb. N. C. 110, holding that such a covenant runs with the land of the adjoining owner.

87. *Jones v. Sleigman*, 81 N. Y. 190. The statutory duty may also be en-

performance. Thus an agreement on the part of a railroad company to run certain cars to the depot of the plaintiff has been specifically performed.⁸⁸ Likewise, performance of an agreement to discontinue an action has been decreed.⁸⁹ So, too, an agreement between a creditor and a third person, founded on a valuable consideration, to compromise the claim of the former against his debtor, has been compelled.⁹⁰ An agreement of a publisher to print a certain advertisement for a specified period has been specifically performed.⁹¹

On the other hand, the remedy of specific performance has been denied in the case of certain miscellaneous agreements. Of these, are an agreement to adopt children,⁹² an indenture of apprenticeship,⁹³ an agreement to become a surety for another,⁹⁴ a contract for the use of canal facilities,⁹⁵ and an agreement between a railroad and express company for the transportation of express parcels.⁹⁶

K. Contracts relating to real estate.

1. In general.

Although actions of specific performance are frequently successful in disputes concerning personal property, the great utility of the action is found in litigations involving real estate.⁹⁷ Almost as a matter of course, a contract vendee of real estate is entitled to maintain an action of specific performance to compel the vendor to execute and deliver a proper conveyance of the property. When an

forced by mandamus. *People ex rel. Garbutt v. Rochester, etc., R. Co.*, 76 N. Y. 294.

^{88.} *Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co.*, 144 N. Y. 152.

^{89.} *Deen v. Milne*, 113 N. Y. 303.

^{90.} *Phillips v. Berger*, 8 Barb. 527.

^{91.} *Goddard v. American Queen*, 44 App. Div. 454, 61 N. Y. Supp. 133, reversing 27 Misc. 482, 59 N. Y. Supp. 46; *Humphrys Mfg. Co. v. Williams Co.*, 70 Misc. 354, 128 N. Y. Supp. 680.

^{92.} *Erlanger v. Erlanger*, 102 Misc. 236, 168 N. Y. Supp. 928, affirmed, 187 App. Div. 887, 172 N. Y. Supp. 1084.

^{93.} *Thomas v. Baird*, 47 Misc. 412, 94 N. Y. Supp. 47.

^{94.} *Goldsmith v. Tolk*, 138 App. Div. 287, 122 N. Y. Supp. 1051, affirmed without opinion, 203 N. Y. 573.

^{95.} *Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.*, 31 N. Y. 91.

^{96.} *Fargo v. New York, etc., R. R.*, 3 Misc. 205, 23 N. Y. Supp. 360, 52 St. Rep. 205.

^{97.} *Stone v. Lord*, 80 N. Y. 60; *Bostwick v. Beach*, 103 N. Y. 414; *Baumann v. Pickney*, 118 N. Y. 604; *Bensinger v. Erhardt*, 74 App. Div. 169, 77 N. Y. Supp. 577.

Partition.—An agreement for the partition of real estate may be specifically performed. *Jones v. Jones*, 118 App. Div. 148, 103 N. Y. Supp. 141.

agreement in relation to real estate is in its nature and circumstances unobjectionable, and the contract is in writing, is certain, and fair in all its parts, is for an adequate consideration, and capable of being performed, it is as much a matter of course for a court of equity to decree a specific performance, as for a court of law to give damages for a breach of it.⁹⁸ The remedy may be denied, in the discretion of the court, when it appears that it will work injustice or hardship to the defendant,⁹⁹ but the existence of an adequate remedy at law will not bar the action.¹ That the vendor is financially responsible to answer for damages, is no answer to the action.² The vendee's remedy in damages, however adequate it may seem in a particular case, is not considered a "perfect" substitute for the lands in question.³

2. Action by vendor.

The remedy of specific performance is available to the vendor as well as to the vendee.⁴ It may be that all that the vendor requires is the acceptance of the deed and the payment of the consideration, and that the vendee is able to answer in an action of damages, but nevertheless the vendor

Mining Privileges.—The court may decree the conveyance of mining privileges, in accordance with the terms of a contract. *Fuller v. Artman*, 69 Hun 546, 24 N. Y. Supp. 13, 53 St. Rep. 339.

License.—While a license may frequently be revoked by the grantor, the right of revocation is suspended where the licensee has paid the consideration for a definite period; and, in such a case, the court may enforce the license by specific performance. It was so held in the case of a license for the maintenance of advertising billboards. *Borough Bill Posting Co. v. Levy*, 70 Misc. 608, 129 N. Y. Supp. 181, affirmed, 144 App. Div. 784, 129 N. Y. Supp. 740.

98. *Viele v. Troy & Boston R. Co.*, 21 Barb. 381, affirmed, 20 N. Y. 184; *Losee v. Morey*, 57 Barb. 561; *Maury v. Post*, 55 Hun 454, 8 N. Y. Supp. 714, 29 St. Rep. 827.

99. See, *infra*, II-W, Discretion of court.

1. See, *infra*, II-X, Adequacy of another remedy.

2. *Jones v. Barnes*, 105 App. Div. 287, 94 N. Y. Supp. 695; *Belanewsky v. Gallaher*, 55 Misc. 150, 105 N. Y. Supp. 77.

3. *Losee v. Morey*, 57 Barb. 561.

4. *Crary v. Smith*, 2 N. Y. 60; *Smyth v. Sturges*, 108 N. Y. 495; *Baumann v. Pickney*, 118 N. Y. 604; *Harris v. Shorall*, 230 N. Y. 343; *Palmer v. Hudson Valley Ry. Co.*, 134 App. Div. 42, 118 N. Y. Supp. 710; *Paul v. Swears*, 138 App. Div. 638, 122 N. Y. Supp. 740; *Boehly v. Mansing*, 52 Misc. 382, 102 N. Y. Supp. 171; *Sauter v. Frank*, 67 Misc. 657, 124 N. Y. Supp. 802; *Schroepel v. Hopper*, 40 Barb. 425; *Losee v. Morey*, 57 Barb. 561; *McWhorter v. McMahan, Clarke*, 400, affirmed, 10 Paige 386; *Arend v. Laing*, 79 Hun 203, 29 N. Y. Supp.

may maintain the action.⁵ The court does not inquire whether damages in a legal action will give the vendor an adequate remedy.⁶ Specific performance may be decreed although the contract provides liquidated damages for a breach thereof,⁷ unless it was the intention of the parties that the remedy by way of liquidated damages was to be exclusive.⁸

3. Leases.

Specific performance is a proper remedy to compel the execution,⁹ or renewal¹⁰ of a lease. The difficulty in cases involving leases lies, not so much in the fact that a limited term in the realty is involved, but in the fact that frequently the contracts for leases are verbal and hence condemned by the Statute of Frauds,¹¹ or that the agreement therefor is so informal that it lacks the certainty required of the instruments which may be specifically performed.¹²

537, 61 St. Rep. 214; *Brown v. Haff*, 5 Paige 235; *Macomb v. Miller*, 9 Paige 265.

5. *Losee v. Morey*, 57 Barb. 561.

6. *Schroeppel v. Hopper*, 40 Barb. 425; *Brown v. Haff*, 5 Paige 235.

7. *Dealy v. Klapp*, 203 App. Div. 216, 196 N. Y. Supp. 702, affirmed without opinion, 236 N. Y. 631.

8. *Dealy v. Klapp*, 199 App. Div. 150, 191 N. Y. Supp. 457; *Dealy v. Klapp*, 203 App. Div. 216, 196 N. Y. Supp. 702, affirmed without opinion, 236 N. Y. 631.

9. *Veeder v. Horstman*, 85 App. Div. 154, 83 N. Y. Supp. 99; *Shea v. Keeney*, 155 App. Div. 628, 140 N. Y. Supp. 912; *Blumenfeld v. Aronson*, 196 App. Div. 189, 187 N. Y. Supp. 585; *Ginsberg v. Oltarsh*, 130 Misc. 891, 224 N. Y. Supp. 622; *Johnson v. Conger*, 14 Abb. Pr. 195; *Kelso v. Kelly*, 1 Daly 419.

Assignment of a Lease.—The holder of a lease may maintain an action of specific performance to compel the purchaser thereof to take the lease. *Covert v. Brinkeroff*, 41 Misc. 230, 84 N. Y. Supp. 4; *Bennett v. Vansyckel*, 4 Duer, 462. An employee securing

the renewal in his own name of a lease of his employer's premises, may be compelled to assign the lease to his employer. *Steinberg v. Steinberg*, 123 Misc. 764, 206 N. Y. Supp. 134.

10. *Greason v. Keteltas*, 17 N. Y. 491; *Smith v. St. Philip's Church*, 107 N. Y. 610; *Wurster v. Arnfield*, 175 N. Y. 256; *Stone v. 434 Broadway Realty Corp.*, 113 Misc. 178, 184 N. Y. Supp. 116; *Johnson v. Conger*, 14 Abb. Pr. 195; *Bamman v. Binzen*, 65 Hun 39, 19 N. Y. Supp. 627, 47 St. Rep. 67, affirmed on opinion below, 142 N. Y. 636.

Option of Landlord.—If a lease gives the landlord the option of renewing it or selling the property to the tenant, the latter cannot compel the landlord to allow him which alternative he will take. *Bamman v. Binzen*, 65 Hun 39, 19 N. Y. Supp. 627, 47 St. Rep. 67, affirmed on opinion below, 142 N. Y. 636.

11. *Czermak v. Wetzel*, 114 App. Div. 816, 100 N. Y. Supp. 167; *Rosen v. Rosen*, 13 Misc. 565, 34 N. Y. Supp. 467, 68 St. Rep. 370. And see, *infra*, II-S, Verbal Contracts.

12. *Mayer v. McCreery*, 119 N. Y.

4. Mortgages.

An agreement to give a mortgage on certain property may, under proper circumstances, be enforced through an action of specific performance.¹³ So, too, an agreement to assign,¹⁴ or satisfy,¹⁵ an existing mortgage may be specifically performed by a court of equity. Or a mortgagee may be compelled to perform an agreement for the release of a part of the premises from the lien of the mortgage.¹⁶ But it is only in an exceptional case, when the plaintiff has no adequate remedy at law or in foreclosure proceedings, that specific performance can be used to decree the payment of a mortgage.¹⁷ Similarly, an agreement to assume a mortgage will not be specifically performed, until it appears by the result of a foreclosure action that a deficiency will result for which the plaintiff will be liable.¹⁸

5. Conditions.

When a grant is made subject to a condition, specific performance of the condition is not generally the proper method for its enforcement. The safer practice is to maintain a

434; *Lloyd v. Worrell*, 37 How. Pr. 75; *Duffield v. Whitlock*, 26 Wend. 55. And see, *infra*, II-T, Certainty of Contract.

13. *Roberge v. Winne*, 144 N. Y. 709; *Dempsey v. McKenna*, 18 App. Div. 200, 45 N. Y. Supp. 973, 79 St. Rep. 973; *Seymour v. Seymour*, 28 App. Div. 495, 51 N. Y. Supp. 130; *Castelli v. Burns*, 156 App. Div. 200, 140 N. Y. Supp. 1057; *De Pierres v. Thorn*, 4 Bosw. (17 Super. Ct.) 266. See also, *Flanders v. Rosoff*, 111 App. Div. 1, 97 N. Y. Supp. 514, affirmed without opinion, 188 N. Y. 616.

A sufficient consideration, for the agreement to give the mortgage, must be established. *Hermann v. Passmore*, 72 Hun 526, 25 N. Y. Supp. 773.

"Satisfactory Security."—An agreement that one shall give "satisfactory security" may be fulfilled by other security than a mortgage on the real estate of the promisor, and specific performance will not lie to compel him

to execute such a mortgage. *Ladd v. Stevenson*, 43 Hun 541, 6 St. Rep. 653, affirmed, 112 N. Y. 325.

14. *Bouton v. Welch*, 48 App. Div. 378, 63 N. Y. Supp. 80.

15. *Woodruff v. Germansky*, 233 N. Y. 365; *Bennett v. Abrams*, 41 Barb. 619.

Conveyance of land before commencement of action.—One who is entitled to specific performance of an agreement to discharge a mortgage on premises owned by him, may maintain the action, although he has transferred the property prior to the commencement of the action, the conveyance being with warranty. *Bennett v. Abrams*, 41 Barb. 619.

16. *Malins v. Brown*, 4 N. Y. 403. See also, *Crouch v. Meyer*, 18 N. Y. Supp. 65, 47 St. Rep. 166.

17. *Coffin v. Lockhart*, 60 Hun 178, 14 N. Y. Supp. 719, 38 St. Rep. 13.

18. *Slauson v. Watkins*, 86 N. Y. 597.

proceeding for the recovery of the thing granted.¹⁹ The general doctrine is based on the proposition that there is no assurance that the grantee of an estate is willing to assume the performance of a condition merely because he is willing to take the estate subject to the condition. He might be willing to hazard the forfeiture of the estate in cases when he would not be willing to assume a personal responsibility for the performance of the condition.²⁰

6. Lost or defective grant.

Where an unrecorded deed of land has been lost, an action in equity is maintainable to compel the grantor, or after his death those representing his title, to execute another deed, so as to clothe the grantee with a record title.²¹ But, where a deed, given for a nominal consideration by one who was under no obligation to convey, is not recorded, but is lost through the carelessness of the grantee, who conveys for value to a third person, the latter cannot maintain an action to compel a conveyance by the heirs of the first grantor, where they make no claim to the premises.²²

A deed which is defective as a grant may, however, be sufficient as a contract to convey, and the execution of a proper deed may be compelled in equity.²³ Where a deed does not convey all of the premises which the grantor agreed to convey, the grantee is entitled to equitable relief to secure

19. *Palmer v. Fort Plain & Coopers-town Plank-road Co.*, 11 N. Y. 376. See also, *Wright v. Taylor*, 1 Edw. Ch. 226, affirmed, 9 Wend. 538.

Contrary Decisions.—In some cases, where one has accepted a grant subject to a condition, it has been held that he is bound in equity to perform the condition, and the courts would compel him to do so. See, *Leonard v. Crommelin*, 1 Edw. Ch. 206; *Spofford v. Manning*, 6 Paige 383; *Stuyvesant v. Mayor, etc.*, of N. Y., 11 Paige 414.

Railroad Grant.—Where a deed to a railroad company stipulated that the grantor and other persons should have annual passes for transportation, it was held that the condition could be enforced against the successor of the

company. *Munroe v. Syracuse, etc., R. Co.*, 200 N. Y. 224.

20. *Palmer v. Fort Plain & Coopers-town Plank-road Co.*, 11 N. Y. 376.

21. *Kent v. Church of St. Michael*, 136 N. Y. 10.

22. *Dull v. Rohr*, 13 Misc. 530, 35 N. Y. Supp. 523.

23. *Leavitt v. Thornton*, 123 App. Div. 683, 108 N. Y. Supp. 162; *Grandin v. Hernandez*, 29 Hun 399.

Defective acknowledgment.—A suit in equity lies to compel a grantor who has contracted to convey a fee by warranty deed to re-acknowledge a deed which was defective in that the venue of the acknowledgment was blank. *Leavitt v. Thornton*, 123 App. Div. 683, 108 N. Y. Supp. 162.

a new conveyance containing a correct description.²⁴ Relief of this character, however, is usually secured in an action of Reformation.²⁵

L. Contracts relating to personal property.

1. In general.

The fact that a contract relates to personal property does not, of itself, preclude the remedy of specific performance, in case a breach of the contract is committed.²⁶ The difference between contracts relating to realty and those relating to personalty, is that the former are enforceable by specific performance without much inquiry as to whether the plaintiff has an adequate remedy in an action at law,²⁷ while, as to the latter, the courts closely adhere to the principle that the remedy cannot be invoked when the plaintiff has an adequate remedy in an action at law.²⁸ The rule has been stated that, as to contracts pertaining to personal property, a party should be confined to his action for damages, unless it appears that he is entitled to the thing contracted for in specie, which to him has some special value and which he cannot readily obtain in the market, or in cases where it is apparent that compensation in damages would not furnish a complete and adequate remedy.²⁹

2. Contract to sell.

While it is true that equity does not ordinarily decree specific performance of contracts for the sale of personal property,³⁰ it has undoubted jurisdiction to do so, and will do so where the plaintiff's case is good, his right clear, and

24. *Wilson v. Van Pelt*, 2 T. & C. 414.

25. See the Chapter on Reformation.

26. *Pennsylvania Coal Co. v. Delaware & Hudson Canal Co.*, 31 N. Y. 91; *Johnson v. Brooks*, 93 N. Y. 337; *Deen v. Milne*, 113 N. Y. 303; *Bomeisler v. Forester*, 154 N. Y. 229; *Petrolia Mfg. Co. v. Jenkins*, 29 App. Div. 403, 51 N. Y. Supp. 1028; *Covert v. Brinkerhoff*, 41 Misc. 230, 84 N. Y. Supp. 4; *Lynch v. Bichoff*, 15 Abb. Pr. 357; *Marsh v. Blackman*, 50 Barb. 329; *Woodward v. Aspinwall*, 3 Sandf. (5 Super. Ct.) 272; *Carpenter v. Mut.*

Safety Ins. Co., 4 Sandf. Ch. 408.

27. See, *supra*, II-K, Contracts Relating to Real estate.

28. *Butler v. Wright*, 186 N. Y. 259; *Butler v. Wright*, 103 App. Div. 463, 93 N. Y. Supp. 113, reversed on other grounds, 186 N. Y. 259; *Phillips v. Berger*, 8 Barb. 527; *Lockmann v. Meehan*, 21 N. Y. Supp. 389, 50 St. Rep. 470, affirmed without opinion, 142 N. Y. 666.

29. *Butler v. Wright*, 186 N. Y. 259; *Lynch v. Bichoff*, 15 Abb. Pr. 357.

30. *Harle v. Brennig*, 131 App. Div. 742, 116 N. Y. Supp. 51.

the remedy at law defective or its enforcement attended with doubt or difficulty.³¹ If the property has a special and peculiar value to the plaintiff, and is difficult to replace the property or determine its value, equity will exercise jurisdiction to compel its transfer.³² But difficulty in ascertaining the damages to which the plaintiff may be entitled, will not generally, of itself, justify a decree for specific performance,³³ though, if the difficulty in determining the damages is such that the remedy at law is practically lost, equity may assume jurisdiction.³⁴ Sale agreements have been thought subject to specific performance, where they contemplated the transfer of such property as ships,³⁵ rare works of art,³⁶ wood,³⁷ or corporate stock.³⁸

The Uniform Sales Law,³⁹ now expresses the rule in the following language: "Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just."

3. Contract to purchase.

A contract to purchase personal property will not be enforced by specific performance, merely because the damages

31. *Hale v. Omaha Nat. Bank*, 49 N. Y. 626; *Bomeisler v. Forester*, 154 N. Y. 229; *Gilbert v. Bunnell*, 92 App. Div. 284, 86 N. Y. Supp. 1123; *Butler v. Wright*, 103 App. Div. 463, 93 N. Y. Supp. 113, reversed on other grounds, 186 N. Y. 259; *Harle v. Brenning*, 131 App. Div. 742, 116 N. Y. Supp. 51; *Menier v. Donald*, 98 Misc. 684, 165 N. Y. Supp. 50.

32. *Covert v. Brinkerhoff*, 41 Misc. 230, 84 N. Y. Supp. 4; *Menier v. Donald*, 98 Misc. 684, 165 N. Y. Supp. 50; *Lynch v. Bischoff*, 15 Abb. Pr. 357n. See also, *Youssoupoff v. Widener*, 246 N. Y. 174.

33. *Gilbert v. Bunnell*, 92 App. Div. 284, 86 N. Y. Supp. 1123; *Butler v. Wright*, 103 App. Div. 463, 93 N. Y. Supp. 113, reversed on other grounds, 186 N. Y. 259.

34. *Williams v. Montgomery*, 148 N. Y. 519.

35. *Menier v. Donald*, 98 Misc. 684, 165 N. Y. Supp. 50.

36. See *Youssoupoff v. Widener*, 246 N. Y. 174.

37. *St. Regis Paper Co. v. Santa Clara Lbr. Co.*, 173 N. Y. 149.

38. See, *infra*, II-M, Contracts relating to stocks and bonds.

39. *Personal Property Law*, § 149.

are uncertain or contingent.⁴⁰ The damages which the plaintiff might recover, are generally an adequate remedy. But, if the defendant is insolvent and the remedy at law would result in a multiplicity of actions, it has been thought in at least one decision, that specific performance might lie to enforce the contract.⁴¹

4. Choses in action.

A chose in action may be the subject of an action of specific performance.⁴² Thus, if equitable reasons are found to exist, the specific performance of an agreement to assign a real estate mortgage may be enforced.⁴³ No doubt, there may be circumstances under which an agreement for the transfer of a chattel mortgage may also be enforced through the aid of a decree of the court. Thus, an action of specific performance of an agreement to give a chattel mortgage, has been sustained.⁴⁴ But an agreement to purchase such a mortgage will not be specifically enforced, unless it is shown that the security is insufficient or that some other equitable reason exists requiring equitable jurisdiction to secure an adequate remedy.⁴⁵ A covenant for the assignment of a patent, or an interest therein, is a proper matter for a decree of specific performance.⁴⁶

M. Contracts relating to stocks and bonds.

1. In general.

The general rule that a contract relating to personal property will not be specifically performed where an adequate remedy at law exists,⁴⁷ is applied to transactions in corporate securities.⁴⁸ A purchaser, or one otherwise en-

40. *Clarke v. Borough Asphalt Co.*, 93 Misc. 662, 157 N. Y. Supp. 581.

41. *Petrolia Mfg. Co. v. Jenkins*, 29 App. Div. 403, 51 N. Y. Supp. 1028.

42. *McGratty v. Krantz Mfg. Co.*, 183 App. Div. 207, 170 N. Y. Supp. 568.

Delivery on checks.—A promise to turn over checks received from the United States government, may be specifically compelled. *Leonard v. Whaley*, 91 Hun 304, 36 N. Y. Supp. 147, 72 St. Rep. 48.

43. See, *supra*, II-K-4, Mortgages.

44. *Hale v. Omaha Nat. Bank*, 49 N. Y. 626.

45. *Lockmann v. Meehan*, 21 N. Y. Supp. 389, 50 St. Rep. 470, affirmed without opinion, 142 N. Y. 666.

46. *Young v. Gilmore*, 59 App. Div. 612, 69 N. Y. Supp. 191. See also, *Cowles v. Rochester Folding Box Co.*, 179 N. Y. 87.

47. See, *supra*, II-L, Contracts relating to personal property.

48. *Bateman v. Straus*, 86 App. Div. 540, 83 N. Y. Supp. 785; *Butler v. Wright*, 103 App. Div. 463, 93 N. Y.

titled to the transfer to him, of stock of a corporation, is, as a general rule, denied the remedy of specific performance.⁴⁹ In the absence of circumstances appealing to a court of equity, the remedy at law for damages is deemed sufficient.⁵⁰ But the rule denying the remedy is limited to cases where compensation in damages furnishes a complete and satisfactory remedy.⁵¹ The fact that the stock is one which is not purchasable in the open market tends to induce a court of equity to assume jurisdiction of the dispute, especially if the stock has a peculiar value to the plaintiff.⁵² Thus, the assignment or transfer of stock in speculative mining venture is sometimes compelled.⁵³ Or, if the stock is all controlled by the defendant, a court of equity may assume jurisdiction.⁵⁴ For similar reasons, where the stock of a corporation is in the hands of a small number of persons, an

Supp. 113, reversed on other grounds, 186 N. Y. 259; *Dingwall v. Chapman*, 63 Misc. 193, 116 N. Y. Supp. 520.

Agreement to buy.—It has been held that an action may be maintained by stockbrokers to compel persons employing them to purchase stock to take and pay for the stocks, the plaintiffs having purchased the stock from other brokers, and to exonerate the plaintiffs from liability to the persons from whom they purchased the stock. *Roberts v. Keene*, 74 Misc. 238, 133 N. Y. Supp. 1091.

Deposit of bonds not required, when the consideration for the agreement has failed. *Stokes v. Stokes*, 148 N. Y. 708.

49. *Brown v. Britton*, 41 App. Div. 57, 58 N. Y. Supp. 353; *Bateman v. Straus*, 86 App. Div. 540, 83 N. Y. Supp. 785; *Kennedy v. Thompson*, 97 App. Div. 296, 89 N. Y. Supp. 963; *Butler v. Wright*, 103 App. Div. 463, 93 N. Y. Supp. 113, reversed on other grounds, 186 N. Y. 259; *Clements v. Sherwood-Dunn*, 108 App. Div. 327, 95 N. Y. Supp. 766, affirmed without opinion, 187 N. Y. 521; *Dingwall v. Chapman*, 63 Misc. 193, 116 N. Y. Supp. 520; *Morrison v. Chapman*, 63 Misc. 195, 116 N. Y. Supp. 522.

50. *Ringler v. Jetter*, 35 Misc. 750, 72 N. Y. Supp. 362; *Bateman v. Straus*, 86 App. Div. 540, 83 N. Y. Supp. 785; *Kennedy v. Thompson*, 97 App. Div. 296, 89 N. Y. Supp. 963; *Harle v. Brennig*, 131 App. Div. 742, 116 N. Y. Supp. 51; *Rawll v. Baker-Vawter Co.*, 187 App. Div. 330, 176 N. Y. Supp. 189.

51. *Johnson v. Brooks*, 93 N. Y. 337; *Rau v. Seidenberg*, 53 Misc. 386, 104 N. Y. Supp. 798. And see, *Galibert v. Hoffman, Inc.*, 120 Misc. 212, 198 N. Y. Supp. 854, affirmed, 207 App. Div. 847, 201 N. Y. Supp. 903, where a contract for the repurchase of stock was specifically enforced.

52. *Johnson v. Brooks*, 93 N. Y. 337; *Waddle v. Cabana*, 220 N. Y. 18; *Swartz v. Marjolet, Inc.*, 214 App. Div. 530, 212 N. Y. Supp. 494; *Doucas v. Manfred*, 220 App. Div. 811, 222 N. Y. Supp. 798; *Rau v. Seidenberg*, 53 Misc. 386, 104 N. Y. Supp. 798; *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300, 31 How. Pr. 38.

53. *Johnson v. Brooks*, 93 N. Y. 337; *Rau v. Seidenberg*, 53 Misc. 386, 104 N. Y. Supp. 798.

54. *Waddle v. Cabana*, 220 N. Y. 18.

agreement by which each gives the others the option of purchasing his stock upon his death or when he desires to sell, may be enforced by specific performance.⁵⁵ But the action will not be entertained where the plaintiff had no special interest in acquiring the stock in question except for the pecuniary advantage which would accrue to him from its ownership, simply because it appears that there have been no sales of the stock in question; that it is not listed on any exchange, and that the defendant is the owner of a large majority of the stock of the corporation, and, hence, that it will be difficult, although not impossible, to ascertain the value of the stock.⁵⁶

The circumstance that a relation of fiduciary nature exists between the parties, or that the plaintiff furnished the money for the acquisition of the stock, assists the plaintiff.⁵⁷ The non-residence of the defendant is also considered by the court in determining whether its equitable powers will be exercised.⁵⁸

2. Action against corporation.

One entitled to a certificate of stock in a corporation may maintain an action of specific performance against the corporation to compel recognition of his status as a stockholder on the books of the corporation and the issuance to him of a proper certificate of stock.⁵⁹ Thus, a corporation which has permitted a transfer of his stock upon a forged power of attorney may be compelled to issue a new certificate.⁶⁰

The holder of a temporary bond which he may surrender and receive in lieu thereof a permanent bond, may maintain an action of specific performance to compel the delivery of the permanent obligation.⁶¹

The right to the remedy is dependent upon the stockholder presenting to the corporation evidence of his title to the certificate; otherwise, the corporation is not in default.⁶² But, although the old certificate is not indorsed, if the trans-

55. *Scruggs v. Cotterill*, 67 App. Div. 583, 73 N. Y. Supp. 882.

56. *Clements v. Sherwood-Dunn*, 108 App. Div. 327, 95 N. Y. Supp. 766, affirmed without opinion, 187 N. Y. 521.

57. *Johnson v. Brooks*, 93 N. Y. 337.

58. *Johnson v. Brooks*, 93 N. Y. 337.

59. *Cushman v. Thayer Mfg. Co.*, 76

N. Y. 365; *Middlebrook v. Merchants' Bank*, 41 Barb. 481, 3 Abb. Dec. 295.

60. *Pollock v. Nat. Bank*, 7 N. Y. 274.

61. *McCadden v. Central Trust Co.*, 92 Misc. 413, 156 N. Y. Supp. 73.

62. *Burhall v. Bushwick R. R.*, 75 N. Y. 211.

feree thereof can show his title, the action may be maintained.⁶³ The taxes on the transfer of stock, evidenced by stamps on the certificate, should be paid; and, in fact, it has been thought necessary to allege in the complaint the payment of such taxes.⁶⁴ On the contrary, it has been held that it is unnecessary to affix the stamps until the actual transfer is made by the corporation.⁶⁵

In this class of cases, the stockholder has an election of remedies. He is not entitled to maintain a proceeding of mandamus to compel the performance of duty by the corporation;⁶⁶ but he may treat the refusal of the corporation to transfer the stock to him as a conversion,⁶⁷ or he may seek the equitable relief. The fact that he may secure money damages for the value of his stock seems to have little effect upon his equitable remedy. A slight change, however, in the situation of the parties may bring into force the principle that equity will not assume jurisdiction when one has an adequate remedy at law. This situation arises when an employee of the corporation seeks to specifically enforce an agreement that he shall have stock for his services; in such a case, a remedy for damages may be thought sufficient for the protection of the employee, especially where no claim is made that the stock has a peculiar value.⁶⁸ Or, in an action by a subscriber of stock, the fact that the stock has an ascertainable value and therefore the plaintiff has an adequate remedy at law, may be considered in denying relief.⁶⁹

N. Contracts for disposition of property of deceased.

1. In general.

One of the most troublesome forms of litigation is the enforcement of an alleged contract whereby it is claimed that a decedent in his lifetime, in consideration of services or some other inducement, agreed to make a testamentary

63. *Reinhard v. Sidney B. Roby Co.*, 110 Misc. 152, 179 N. Y. Supp. 781.

64. *Luitwieler v. Luitwieler Pumping Engine Co.*, 190 App. Div. 80, 179 N. Y. Supp. 933.

65. *Smyth v. Pure Ice Co.*, 193 App. Div. 479, 184 N. Y. Supp. 305.

66. *Cushman v. Thayer Mfg. Jewelry Co.*, 76 N. Y. 365; *Travis v. Knox Terpezone Co.*, 215 N. Y. 259, 264;

Kortright v. Buffalo Commercial Bank, 20 Wend. 91.

67. *Travis v. Knox Terpezone Co.*, 215 N. Y. 259.

68. *Kennedy v. Thompson*, 97 App. Div. 296, 89 N. Y. Supp. 963.

69. *Donovan v. Powers Film Products*, 111 Misc. 276, 181 N. Y. Supp. 157.

disposition of property in favor of another. Contracts claimed to have been made with aged persons to be enforced after their death, and which tend to disinherit the lawful heirs, although not void as against public policy, are viewed with suspicion, and are closely scrutinized by the courts; and especially is this true when the contracts were oral and inconsistent with subsequent testamentary dispositions of their estates.⁷⁰

Strictly speaking, an agreement to make a certain disposition of property by will, is not capable of specific execution; yet it is held that the contract is within the jurisdiction of courts of equity to do what is equivalent of a specific performance of such an agreement, by requiring those to whom the decedent's property has passed to convey the property in accordance with the decedent's contract.⁷¹

The courts do not allow the remedy to be defeated because the deceased has made testamentary provisions inconsistent with his agreement.⁷² The admission to probate of the will does not bar the right of the claimant.⁷³ The pending action for specific performance is no defense to the probate of the

70. *Shakespear v. Markham*, 72 N. Y. 400, affirming, 10 Hun 311; *Braun v. Ochs*, 77 App. Div. 20, 79 N. Y. Supp. 100; *Hall v. Gilman*, No. 1, 77 App. Div. 458, 79 N. Y. Supp. 303; *Tousey v. Hastings*, 127 App. Div. 94, 111 N. Y. Supp. 344, affirmed, 194 N. Y. 79; *Gall v. Gall*, 64 Hun 600, 29 Abb. N. C. 19, 19 N. Y. Supp. 332, 46 St. Rep. 806, affirmed, 138 N. Y. 675. "Contracts of the character in question have become so frequent in recent years as to cause alarm, and the courts have grown conservative as to the nature of the evidence required to establish them, and in enforcing them, when established, by specific performance. Such contracts are easily fabricated and hard to disprove, because of the sole contracting party on one side is always dead when the question arises. They are the natural resort of unscrupulous persons who wish to despoil the estates of decedents." *Hamlin v. Stevens*, 177 N. Y. 39.

Against public policy.—Where one agreed to leave his estate to a nephew, in consideration of certain acts to be performed by such nephew, but the uncle thereafter marries and has issue, the enforcement of the agreement will be denied, as an agreement by one which contemplates the taking of his estate from his future wife and children is said to be against public policy. *Gall v. Gall*, 64 Sun 600, 29 Abb. N. C. 19, 19 N. Y. Supp. 332, 46 St. Rep. 806, affirmed, 138 N. Y. 675.

71. *Colby v. Colby*, 81 Hun 221, 24 Civ. Proc. 148, 30 N. Y. Supp. 677, 62 St. Rep. 631.

72. *Colby v. Colby*, 81 Hun 221, 24 Civ. Proc. 148, 30 N. Y. Supp. 677, 62 St. Rep. 631.

73. *Kine v. Farrell*, 71 App. Div. 219, 75 N. Y. Supp. 542; *Heath v. Heath*, 19 Misc. 521, 42 N. Y. Supp. 1087, 76 St. Rep. 1087.

will.⁷⁴ The legal title of the devisee under the will may be impressed with a trust in favor of the plaintiff.⁷⁵

The difficulty in this class of cases is not so much in determining the principles of law applicable, as in determining whether the contract of the deceased has been sufficiently established. If the alleged contract meets the requirements of the law and is clearly established by the evidence, courts of equity will compel performance.⁷⁶

An agreement not to change or revoke a will already in existence, when founded on a good consideration, receives the same equitable consideration as an agreement to make a will; and, in a proper case, will be specifically enforced.⁷⁷ There is no distinction between an agreement to will one's property to an individual and a promise that such individual shall be considered as a lawful heir and one of the next of kin of the obligor.⁷⁸

A power of appointment to be exercised by will is in its nature ambulatory, and its exercise is intended to represent

74. *Matter of Martin*, 128 Misc. 659, 220 N. Y. Supp. 398; *McCormack v. Halstead*, 132 Misc. 916, 231 N. Y. Supp. 213.

75. *Kine v. Farrell*, 71 App. Div. 219, 75 N. Y. Supp. 542; *Wilson v. Heath*, 23 Misc. 714, 53 N. Y. Supp. 166.

76. *Lobdell v. Lobdell*, 36 N. Y. 327; *Parsell v. Stryker*, 41 N. Y. 480; *Winne v. Winne*, 166 N. Y. 263; *Middleworth v. Ordway*, 191 N. Y. 404; *Sarasohn v. Kamaiky*, 193 N. Y. 203; *Crocker v. New York Trust Co.*, 245 N. Y. 17; *Johannes v. Martian*, 22 App. Div. 561, 48 N. Y. Supp. 102; *Gates v. Gates*, 34 App. Div. 608, 54 N. Y. Supp. 454; *Healy v. Healy*, 55 App. Div. 315, 66 N. Y. Supp. 927, affirmed without opinion, 166 N. Y. 624; *Kine v. Farrell*, 71 App. Div. 219, 75 N. Y. Supp. 542; *Hall v. Gilman*, No. 1, 77 App. Div. 458, 79 N. Y. Supp. 303; *Matter of Steglich*, 91 App. Div. 75, 86 N. Y. Supp. 257; *Hansen v. Kelly*, 219 App. Div. 469, 220 N. Y. Supp. 107; *Thomas v. Hens*, 219 App. Div. 627, 220 N. Y. Supp. 785; *Grundt v. Shenk*, 222 App. Div. 82, 225 N. Y.

Supp. 317; *Thomas v. Hens*, 224 App. Div. 252, 229 N. Y. Supp. 725; *Korminsky v. Korminsky*, 2 Misc. 138, 21 N. Y. Supp. 611; *Heath v. Heath*, 18 Misc. 521, 42 N. Y. Supp. 1087, 76 St. Rep. 1087; *Healy v. Healy*, 31 Misc. 636, 66 N. Y. Supp. 82, affirmed, 55 App. Div. 315, 66 N. Y. Supp. 927, affirmed, 166 N. Y. 624; *Goldstein v. Goldstein*, 35 Misc. 251, 71 N. Y. Supp. 907; *Le Vie v. Fenlon*, 39 Misc. 265, 79 N. Y. Supp. 496; *Bush v. Whitaker*, 45 Misc. 74, 91 N. Y. Supp. 616; *Houser v. Wickham*, 105 Misc. 735, 172 N. Y. Supp. 680; *Barrett v. Miner*, 119 Misc. 230, 196 N. Y. Supp. 175; *Blaisdell v. Spencer*, 124 Misc. 302, 208 N. Y. Supp. 495; *Salem v. Finney*, 127 Misc. 387, 215 N. Y. Supp. 553; *Godine v. Kidd*, 64 Hun 585, 29 Abb. N. C. 36, 19 N. Y. Supp. 335, 46 St. Rep. 813; *Erwin v. Erwin*, 17 N. Y. Supp. 442, 44 St. Rep. 6, affirmed on opinion below, 139 N. Y. 616.

77. *Kine v. Farrell*, 71 App. Div. 219, 75 N. Y. Supp. 542.

78. *Barrett v. Miner*, 119 Misc. 230, 196 N. Y. Supp. 175.

the final judgment of the donee. Such a power may not be exercised by grant. Nor can it be executed by force of an agreement to make a will; and hence a contract controlling the exercise of the power is not enforceable in equity.⁷⁹

2. Requirements as to contract.

In order to move a court of equity to enforce a contract of this nature by specific performance, the contract must be definite and certain,⁸⁰ it must have the essentials of a contract,⁸¹ it must be fair and equitable,⁸² it must be mutual and founded on an adequate consideration;⁸³ and, if in parol, it must be established by the testimony of disinterested witnesses.⁸⁴ Although, in some of the reported decisions, there are expressions that a contract of this nature "should" be

79. *Farmers' L. & T. Co. v. Mortimer*, 219 N. Y. 290.

80. *Stanton v. Miller*, 58 N. Y. 192; *Shakespear v. Markham*, 72 N. Y. 400, affirming, 10 Hun 311; *Winne v. Winne*, 166 N. Y. 263; *Mahaney v. Carr*, 175 N. Y. 454; *Gates v. Gates*, 34 App. Div. 608, 54 N. Y. Supp. 454; *Ripson v. Hart*, 64 App. Div. 593, 72 N. Y. Supp. 791; *Braun v. Ochs*, 77 App. Div. 20, 79 N. Y. Supp. 100; *Conlon v. Mission of Immaculate Virgin*, 84 App. Div. 507, 82 N. Y. Supp. 998, modifying, 39 Misc. 215, 79 N. Y. Supp. 406; *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Hanly v. Hanly*, 105 App. Div. 335, 93 N. Y. Supp. 864; *Tousey v. Hastings*, 127 App. Div. 94, 111 N. Y. Supp. 344, affirmed, 194 N. Y. 79; *Wilson v. Heath*, 23 Misc. 714, 53 N. Y. Supp. 166; *Spencer v. Hay Library Assn.*, 37 Misc. 608, 76 N. Y. Supp. 109; *Cross v. Hoy*, 101 Misc. 75, 166 N. Y. Supp. 516; *Gall v. Gall*, 64 Hun 600, 29 Abb. N. C. 19, 19 N. Y. Supp. 332, 46 St. Rep. 806, affirmed, 133 N. Y. 675; *Harder v. Harder*, 2 Sandf. Ch. 17, 3 N. Y. Leg. Obs. 122. And see, *infra*, II-T, Certainty of contract.

81. *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140.

82. *Hamlin v. Stevens*, 177 N. Y.

39; *Middleworth v. Ordway*, 191 N. Y. 404; *Healy v. Healy*, 55 App. Div. 315, 66 N. Y. Supp. 927, affirmed without opinion, 166 N. Y. 624; *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Hanly v. Hanly*, 105 App. Div. 335, 93 N. Y. Supp. 864; *Houser v. Wickham*, 105 Misc. 735, 172 N. Y. Supp. 680.

83. *Mahaney v. Carr*, 175 N. Y. 454; *Ide v. Brown*, 178 N. Y. 26; *Healy v. Healy*, 55 App. Div. 315, 66 N. Y. Supp. 927, affirmed without opinion, 166 N. Y. 624; *Braun v. Ochs*, 77 App. Div. 20, 79 N. Y. Supp. 100; *Conlon v. Mission of Immaculate Virgin*, 84 App. Div. 507, 82 N. Y. Supp. 998, modifying, 39 Misc. 215, 79 N. Y. Supp. 406; *Tousey v. Hastings*, 127 App. Div. 94, 111 N. Y. Supp. 344, affirmed, 194 N. Y. 79; *Spencer v. Hay Library Assn.*, 37 Misc. 608, 76 N. Y. Supp. 109; *Cross v. Hoy*, 101 Misc. 75, 166 N. Y. Supp. 516; *Gall v. Gall*, 64 Hun 600, 29 Abb. N. C. 19, 19 N. Y. Supp. 332, 46 St. Rep. 806, affirmed, 133 N. Y. 675; *Pullman v. Johnson*, 8 N. Y. Supp. 775. And see, *Grundt v. Shenk*, 222 App. Div. 82, 225 N. Y. Supp. 317. And see, *infra*, II-W-4, Inadequate consideration.

84. See the following paragraph.

in writing, there is no such absolute requirement as a matter of law. Even an oral contract relating to real estate, and hence within the Statute of Frauds, may be enforced, where the plaintiff in reliance thereon has partially performed it.⁸⁵

3. Sufficiency of proof.

If the contract between the decedent and the plaintiff was reduced to writing, and is unobjectionable, specific performance will be decreed almost as a matter of course, particularly if the agreement is for the devise of real estate.⁸⁶ If resting on parol evidence, the proof must be clear and convincing,⁸⁷ and must be given or corroborated by disinterested witnesses.⁸⁸ Ordinarily, the declarations of the deceased will be insufficient to establish the contract,⁸⁹ but may be of value when corroborated by other evidence.⁹⁰ Delay in presenting the claim, in the meantime the claimant accepting the provisions of the will, may cause a denial of relief.⁹¹

4. Parties to contract.

Equity recognizes some exceptions to the general rule that only the parties to a contract can maintain an action thereon. A promisee who has parted with a substantial sum in exchange for the promise of another to pay a similar amount to third party beneficiaries may maintain an action in equity

85. *Lobdell v. Lobdell*, 36 N. Y. 327; *Salem v. Finney*, 127 Misc. 387, 215 N. Y. Supp. 553; *Erwin v. Erwin*, 17 N. Y. Supp. 442, 44 St. Rep. 6, affirmed on opinion below, 139 N. Y. 616. And see, *infra*, II-S, Verbal Contracts.

86. *Parsell v. Stryker*, 41 N. Y. 480.

87. *Hamlin v. Stevens*, 177 N. Y. 39; *Holt v. Tuite*, 188 N. Y. 17; *Ripson v. Hart*, 64 App. Div. 593, 72 N. Y. Supp. 791; *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Tousey v. Hastings*, 127 App. Div. 94, 111 N. Y. Supp. 344, affirmed, 194 N. Y. 79; *Thomas v. Hens*, 224 App. Div. 252, 229 N. Y. Supp. 725; *Wilson v. Heath*, 23 Misc. 714, 53 N. Y. Supp. 166; *Fisher v. Fallon*, 142 N. Y. Supp. 72.

88. *Middleworth v. Ordway*, 191 N. Y. 404; *Taylor v. Higgs*, 202 N. Y. 65; *Braun v. Ochs*, 77 App. Div. 20, 79 N. Y. Supp. 100; *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Cross v. Hoy*, 101 Misc. 75, 166 N. Y. Supp. 516; *Houser v. Wickham*, 105 Misc. 735, 172 N. Y. Supp. 680; *Fisher v. Fallon*, 142 N. Y. Supp. 72.

89. *Holt v. Tuite*, 188 N. Y. 17; *Tousey v. Hastings*, 127 App. Div. 94, 111 N. Y. Supp. 344, affirmed, 194 N. Y. 79; *McCallum v. Pickens*, 126 Misc. 436, 213 N. Y. Supp. 119; *Pullman v. Johnson*, 8 N. Y. Supp. 775.

90. *Hansen v. Kelly*, 219 App. Div. 469, 220 N. Y. Supp. 107.

91. *McCallum v. Pickens*, 126 Misc. 436, 213 N. Y. Supp. 119.

to enforce the contract.⁹² Where a parent makes a contract for the benefit of a child of tender years giving a third person the care and custody of such child under an agreement that the child shall be treated as an heir or shall receive a devise from such foster parent, the agreement may be specifically enforced by the child.⁹³ A clause of the contract providing for the adoption of the child cannot be specifically performed, but this does not avoid the obligation of that part of the contract which provides for the child's inheritance.⁹⁴

Where a childless wife, who desired to leave property to a dependent niece, told her husband, who was a lawyer and had drawn her will according to her instructions, that it was not as she wanted it; that she wanted to leave her house and lot to such niece, but as her strength was waning she was afraid she would not live long enough to sign another will and her husband solemnly promised that, if she signed this will, he would leave the niece enough in his will to make up the deficit, and testatrix thereupon executed the will, but her husband failed to carry out his promise, the niece can maintain an action against the executors of the husband's estate to enforce the promise.⁹⁵

92. *Crocker v. New York Trust Co.*, 245 N. Y. 17.

93. *Winne v. Winne*, 166 N. Y. 263; *Middleworth v. Ordway*, 191 N. Y. 404; *Brantingham v. Huff*, 43 App. Div. 414, 60 N. Y. Supp. 157; *Heath v. Heath*, 18 Misc. 521, 42 N. Y. Supp. 1087; *Healy v. Healy*, 31 Misc. 636, 66 N. Y. Supp. 82, affirmed, 55 App. Div. 315, 66 N. Y. Supp. 927, affirmed, 166 N. Y. 624; *Rhoades v. Schwartz*, 41 Misc. 648, 85 N. Y. Supp. 229; *Godine v. Kidd*, 64 Hun 585, 29 Abb. N. C. 36, 19 N. Y. Supp. 335, 46 St. Rep. 813; *Townsend v. Perry*, 124 N. Y. Supp. 143. But see, *Mahaney v. Carr*, 175 N. Y. 454, doubting the enforcement of an oral contract relating not to some specific property, but to a share of a decedent's estate generally. And see, *Ennis v. Chichester*, 187 App. Div. 53, 175 N. Y. Supp. 244, where the deceased left a will contrary to the alleged oral contract, and it was

held that the evidence was insufficient to establish an irrevocable oral contract by which the deceased was bound to leave his property to the plaintiff.

Infancy of the claimant has been said to be a necessary element of the cause of action. *Seager v. Tholens*, 182 App. Div. 317, 170 N. Y. Supp. 482.

94. *Middleworth v. Ordway*, 191 N. Y. 404.

95. *Seaver v. Ransom*, 224 N. Y. 233. See also, *Wait v. Wilson*, 36 App. Div. 485, 83 N. Y. Supp. 834, holding that an agreement made by a husband with his wife, that the wife shall will to the husband's son by a former wife so much of the property willed to her by her husband as shall remain at her death, does not entitle the son, in the event of the death of his step-mother, without performing the contract, to maintain an action for its

And an action of specific performance may be maintained for the enforcement of a contract under seal whereby the parties made an agreement as to the distribution of the property of a relative, in whose estate they would share equally in case of death intestate.⁹⁶

5. Mutual wills.

Ordinarily there is no rule of law or of public policy which precludes competent parties from making an agreement to execute mutual and reciprocal wills; which, though remaining revocable upon notice being given by either of an intention to revoke, become, upon the death of one, fixed obligations, of which equity will assume enforcement, if attempted to be impaired by subsequent testamentary provisions on the part of the survivor.⁹⁷ In such a case, a court of equity proceeds upon the ground that the survivor is bound, not merely in honor, but by his agreement and by the acceptance of the benefits which the agreement procures for him. The obligation of the survivor to carry out the contract is said to rest on contract.⁹⁸ In such a case, obviously, no remedy at law would be adequate to the party for whose ultimate benefit the agreement was made. Therefore, equity performs its high function of supplying the relief, which the rules of law are not sufficiently elastic to comprehend, and decrees a specific performance of the testamentary agreement, by compelling those persons into whose hands the property affected may come to account for and deliver it over to the complainant.⁹⁹ Equity will hold

specific performance, where he was not a party to the contract and no consideration moved from him to either of the parties, and it does not appear that he was an infant at the time the contract was made, or that either of the parties thereto was under any legal or equitable obligation to him.

96. *Nugent v. Smith*, 202 App. Div. 279, 195 N. Y. Supp. 338.

97. *Edson v. Parsons*, 155 N. Y. 555; *Rastetter v. Hoenninger*, 214 N. Y. 66; *Morgan v. Sanborn*, 225 N. Y. 454; *Herman v. Ludwig*, 186 App. Div. 287, 174 N. Y. Supp. 469; *Smith v. Furst*, 186 App. Div. 452, 174 N. Y. Supp. 481; *Herrick v. Snyder*, 27 Misc. 462,

59 N. Y. Supp. 229; *Wallace v. Wallace*, 71 Misc. 305, 130 N. Y. Supp. 58. Compare, *Gooding v. Brown*, 35 Hun 148.

An oral agreement has been denied enforcement as within the Statute of Frauds, where there was no part performance on the part of the person claiming to be a beneficiary. *Everdell v. Hill*, 58 App. Div. 151, 68 N. Y. Supp. 719.

98. *Rastetter v. Hoenninger*, 151 App. Div. 853, 136 N. Y. Supp. 961.

99. *Edson v. Parsons*, 155 N. Y. 555; *Rastetter v. Hoenninger*, 214 N. Y. 66; *Hermann v. Ludwig*, 186 App. Div. 287, 174 N. Y. Supp. 469.

them as trustees for the execution of the agreement.¹ But like other classes of contracts sought to be specifically enforced, it is essential that the complainant show a definite and certain agreement.²

It is not essential to the intervention of equity, in order to prevent the accomplishment of fraud, that the agreement should be established by direct evidence. It may be established by such facts and circumstances as raise an implication that the agreement was made, and may have reinforcement from evidence of the conduct of the parties.³ But the burden of proof is upon the party claiming the existence of such a contract to establish it by clear and convincing evidence.⁴ If there is no direct proof of the contract, it is not enough that from the language of the wills and surrounding facts and circumstances it can be equally well argued that

1. *Smith v. Furst*, 186 App. Div. 452, 174 N. Y. Supp. 481.

2. *Edson v. Parsons*, 155 N. Y. 555; *Everdell v. Hill*, 58 App. Div. 151, 68 N. Y. Supp. 719; *Wallace v. Wallace*, 71 Misc. 305, 130 N. Y. Supp. 58.

Certainty.—An agreement is valid and enforceable under which a childless husband and wife execute wills giving all their property to each other, the survivor to execute a will disposing of the entire property constituting both estates by distributing the same among the next of kin of the husband and wife, the distribution to be made in sums according to the judgment of the survivor. *Morgan v. Sanborn*, 225 N. Y. 454, reversing, 173 App. Div. 946.

Meeting of minds of parties.—In an action for the specific performance of an agreement for mutual wills, the plaintiff must furnish proof that the minds of the parties met on the precise terms of the agreement under which the mutual wills were executed. This is not established by proof that testatrix agreed to make a will irrevocable *without the consent* of plaintiff and defendant, where plaintiff relies on and testifies to a mutual agreement to make wills irrevocable

without notice to the others. An agreement to make mutual wills revocable only by consent is not the same as an agreement to make mutual wills revocable on notice. The element of mutuality of assent is, therefore, lacking. *Lally v. Cronen*, 247 N. Y. 58.

3. *Edson v. Parsons*, 155 N. Y. 555; *Hermann v. Ludwig*, 186 App. Div. 287, 174 N. Y. Supp. 469; *Smith v. Furst*, 186 App. Div. 452, 174 N. Y. Supp. 481; *Herrick v. Snyder*, 27 Misc. 462, 59 N. Y. Supp. 229.

4. *Cooke v. Burlingham*, 105 Misc. 675, 173 N. Y. Supp. 614.

Personal transactions with deceased.—In an action to compel specific performance of an alleged contract between plaintiff, defendant individually and testatrix, to make mutual wills irrevocable without notice to the others, testimony of plaintiff of conversations between herself and defendant in the presence of testatrix, are incompetent, under section 347 of the Civil Practice Act, to establish acquiescence and consent of the dead woman from her presence and silence on these occasions. *Lally v. Cronen*, 247 N. Y. 58.

such a contract was made or that it was not made.⁵ The agreement may be sufficiently shown by the production of a joint and mutual will, such a will being deemed *prima facie* evidence of a contract binding on the survivor in the absence of evidence negating the agreement.⁶ But the mere fact that the parties have executed similar separate wills with cross provisions in favor of the survivor and with ultimate provisions for the same beneficiary does not necessarily establish the agreement.⁷ The mere making of mutual wills is insufficient to indicate a binding contract to make such wills, irrevocable after the death of either party, even though the provisions in both wills are identical, though the similarity in the terms of mutual wills may be regarded as some evidence of such a contract.⁸

O. Illegal contracts.

A contract which is classed by the law as illegal will not be enforced in an action of specific performance. In this respect the equitable maxim that equity follows the law will be applied. Hence, equity will not specifically enforce a contract which is *nudum pactum*.⁹ An auction sale, at which the owner has secretly employed "puffers" to enhance the price, is unenforceable by the owner.¹⁰ Equity may refuse to decree performance of a contract between two corporations having a common director who is instrumental in securing the execution of the contract, if the contract is unfair as to the corporation sought to be charged thereby.¹¹ All men are endowed with the inalienable right to liberty; and with few exceptions no contract which deprives a person of his liberty can be specifically enforced by the judgment or order of a court that he shall specifically perform it; and as a general rule force cannot be used to compel any person to perform such a contract.¹²

A contract which is contrary to public policy will not be

5. *Cooke v. Burlingham*, 105 Misc. 675, 173 N. Y. Supp. 614.

6. *Rastetter v. Hoenninger*, 151 App. Div. 853, 136 N. Y. Supp. 961; *Hermann v. Ludwig*, 186 App. Div. 287, 174 N. Y. Supp. 469.

7. *Edson v. Parsons*, 155 N. Y. 555.

8. *Wallace v. Wallace*, 71 Misc. 305, 130 N. Y. Supp. 53.

9. See, *infra*, II-W-4, Inadequate consideration.

10. *Bowman v. McClenahan*, 20 App. Div. 438, 44 N. Y. Supp. 482.

11. *Globe Woolen Co. v. Utica Gas & Elec. Co.*, 224 N. Y. 483.

12. *Matter of Baker*, 29 How. Pr. 485.

enforced in an action of specific performance.¹³ Thus, the courts may refuse to lend their aid to the enforcement of a contract in restraint of trade, though if the restraint is limited as to time or territory, it is not condemned.¹⁴ An agreement by a wife that she will discontinue an action for divorce, release her inchoate dower in her husband's realty, receive her support, and live separate from her husband, has been held unenforcible.¹⁵ But, after a husband and wife have separated, modern law permits them to enter into an agreement providing for the support of the wife and the relinquishment by her of dower rights.¹⁶ Contracts providing for the disposition of one's property upon his death, although regarded with suspicion, are not against public policy, and in a proper case may be specifically enforced.¹⁷

P. Unauthorized contracts.

If the making of a contract by an alleged agent is not within the scope of his employment, his principal is not bound thereby.¹⁸ The fact of agency or the scope of the agent's authority may be questions of fact.¹⁹ If the principal and agent are husband and wife or are otherwise

13. Contest.—A winner of a contest promoted by a newspaper will not be denied relief on the ground that the contract was a wagering contract or a lottery, where chance was not the sole element of success. *Hoff v. Daily Graphic, Inc.*, 132 Misc. 597, 230 N. Y. Supp. 360.

14. "The contract sought to be enforced in this action is clearly one in restraint of trade, because the effect of it is to prevent the defendant for twenty years from engaging in the manufacture of fireworks, which is his sole business. In actions for the specific performance of such contracts, the courts have been for many years relaxing the strict rules which formerly obtained, until now it may be laid down as the law applicable to them that the mere fact that the contract operates to restrain one of the parties to it from engaging in a particular business for a considerable time and within a great extent of

territory is not in itself sufficient to induce the court to refuse specific performance of it, if it appears to be reasonable with regard to the circumstance under which it was made, not oppressive in its operation upon the person to be restrained, and supported by a valuable consideration." *Central Fireworks Co. v. Charlton*, 42 App. Div. 104, 58 N. Y. Supp. 900.

15. *Armstrong v. Armstrong*, 1 St. Rep. 529.

16. *Greenleaf v. Blakeman*, 40 App. Div. 371, 58 N. Y. Supp. 76, affirmed without opinion, 166 N. Y. 627.

17. *Hall v. Gilman*, No. 1, 77 App. Div. 458, 79 N. Y. Supp. 303. And see, *supra*, II-N, Contracts for disposition of property of deceased.

18. *Beattie v. Burt*, 122 App. Div. 473, 107 N. Y. Supp. 153; *Lee v. Lloyd*, 111 Misc. 405, 181 N. Y. Supp. 295.

19. *Garfunkel v. Malcolmson*, 217 App. Div. 632, 217 N. Y. Supp. 32.

closely related, there is usually little difficulty in establishing the authority of the agent.²⁰ If the contract is under seal, an undisclosed principal will not be bound.²¹

The acts of an unauthorized agent may be ratified by the owner, so that both he and the purchaser will be bound by the contract. The ratification may be by parol.²² Where an agent, although having no title to premises, contracts to convey them in his own name and, upon closing, presents a deed from his principal, the true owner, there is a sufficient ratification of the acts of the agent and the court will compel a contracting purchaser, who has in the meantime incurred no responsibilities or expenditures in reliance upon the presumed ownership of the agent, to accept the title.²³

A religious corporation cannot sell its real property without the consent of the court; but it may enter into a contract for the sale of real property with the condition that conveyance be made upon permission of the court. And it has been said that a court of equity in an action to compel the specific performance of such a contract has the power to inquire into the fairness of the contract and its advantage to the corporation and to approve the proposed conveyance and to direct it to be made where no valid reason appears for refusing the relief.²⁴ Clearly the action can be maintained after the court has approved the proposed conveyance.²⁵

Contracts of municipalities for the purchase of lands are closely examined with a view of determining whether they are within the powers of the officers purporting to make them.²⁶

20. *Mitchell v. Lath*, 247 N. Y. 377; *Le Long v. Siebrecht*, 196 App. Div. 74, 187 N. Y. Supp. 150; *Diamond v. Talbott*, 123 Misc. 339, 205 N. Y. Supp. 309.

21. See, *infra*, II-S-2, Sufficiency of note or memorandum.

22. *Newton v. Bronson*, 13 N. Y. 587; *Alpert v. G. R. E. Constr. Corp.*, 222 App. Div. 60, 225 N. Y. Supp. 327.

23. *McDonald v. Bach*, 29 Misc. 96, 60 N. Y. Supp. 557, affirmed, 51 App. Div. 549, 64 N. Y. Supp. 831.

24. *Muck v. Hitchcock*, 149 App. Div. 323, 134 N. Y. Supp. 271.

25. *Bowen v. Irish Presbyterian Congregation*, 6 Bosw. (19 Super. Ct.) 245.

26. *Union Real Estate Co. v. New York*, 183 App. Div. 417, 170 N. Y. Supp. 734. And see, *Kane-Cadillac Co. v. City of Buffalo*, 128 Misc. 835, 221 N. Y. Supp. 167.

Public dump.—Specific performance will not be decreed of a contract made by the board of trustees of an incorporated village for the purchase of land *outside* of the village for the purpose of the establishment of a public dump. *Gibson v. Village of*

A contract to sell lands made by an administrator prior to a decree of the surrogate empowering him to sell and the filing of the bond required by the statute is void, and the vendee cannot compel specific performance, although the administrator subsequently obtains permission to sell.²⁷ But where an executor is empowered by the will to sell the real estate of the deceased and he enters into an executory contract for the sale thereof, the contract may be enforced in equity at the suit of the purchaser.²⁸

Q. Contracts difficult of enforcement.

It is against the policy of courts of equity to make decrees which are impossible²⁹ or difficult of enforcement.³⁰ In the exercise of its discretion the court may refuse the remedy in such a case.³¹ "Contracts which require the performance of varied and continuous acts, or the exercise of special skill, taste and judgment, will not, as a general rule, be enforced by courts of equity, because the execution of the decree would require such constant superintendence as to

Massena, 109 Misc. 505, 178 N. Y. Supp. 850.

Conditional contract.—A contract for the purchase of real estate executed by the city of Syracuse in conformity with a resolution adopted by the common council, providing for the payment of a portion of the purchase price on a date specified, "the balance to be paid for in such manner as the city is authorized by an act of the legislature to be passed at the legislative session commencing January 1, 1900," cannot be specifically enforced and the city compelled to accept the deed where no payment was ever made upon the contract, and no act authorizing the payment by the city of the purchase price or any part thereof has been passed by the legislature, since the provision for payment is not absolute, but conditional, depending upon future action by the legislature, and such action must be regarded as a condition precedent to any obligation on the part of the city.

Lighton v. City of Syracuse, 188 N. Y. 499.

Loan commissioners are authorized to sell real estate only on approval by the state comptroller of the contract of sale. Hence, a complaint in an action for the specific performance of a contract, alleged to have been made by such commissioners, is defective, if it fails to allege that the comptroller approved the sale. Switzer v. Commissioners, 134 App. Div. 487, 119 N. Y. Supp. 383.

27. Bauman v. Goldthorpe, 129 App. Div. 19, 113 N. Y. Supp. 136.

28. Bostwick v. Beach, 103 N. Y. 414.

29. See, *infra*, II-V, Impossibility of performance; and *infra*, IV-F-2, Impossibility of performance.

30. Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60, affirming, 30 App. Div. 564.

31. Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60, affirming, 30 App. Div. 564.

make judicial control a matter of extreme difficulty.”³² Hence, a contract requiring the performance of continuous acts, with possibilities of repeated applications to the court for relief, will not ordinarily be specifically enforced.³³ This difficulty of enforcement is one of the reasons why the courts avoid the specific performance of contracts providing for the rendition of personal services,³⁴ or agreements to arbitrate,³⁵ or contracts for construction or repair work.³⁶

An exception to the general rule, founded upon the rights of the public rather than those of the plaintiff, obtains with reference to contracts relating to the management and control of railroads and other agencies of transportation which enjoy special privileges conferred by statute and promote the general welfare.³⁷ And the fact that the performance of the contract will take many years, does not necessarily preclude the remedy of specific performance.³⁸

R. Contracts for continuous acts.

A contract stipulating for the performance of continuous acts will not ordinarily be enforced in an action of specific performance.³⁹ The difficulty of exacting performance tends to induce the court, in its discretionary power, to deny the remedy.⁴⁰ Contracts for personal services requiring skill and judgment,⁴¹ and contracts for building construction,⁴² are normally in this class. But the fact that the contract has many years future duration does not necessarily preclude its specific performance.⁴³ Favorable consideration is given contracts in which the public have an interest, such as contracts for railway transportation.⁴⁴

32. *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60.

33. See the following paragraphs.

34. See, *supra*, II-H, Services.

35. *Creason v. Kettletas*, 17 N. Y. 491. See, *supra*, II-B, Arbitrations.

36. *Backes v. Curran*, 36 Misc. 492, 73 N. Y. Supp. 937, reversed on other grounds, 69 App. Div. 188, 74 N. Y. Supp. 723. See, *supra*, II-I, Construction contracts.

37. *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, affirming, 30 App. Div. 564.

38. *St. Regis Paper Co. v. Santa Clara Lumber Co.*, 173 N. Y. 149.

39. *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, affirming, 30 App. Div. 564; *Fargo v. New York, etc.*, R. R., 3 Misc. 205, 23 N. Y. Supp. 360, 52 St. Rep. 205.

40. See the preceding paragraph.

41. See, *supra*, II-H, Services.

42. See, *supra*, II-I, Construction contracts.

43. *St. Regis Paper Co. v. Santa Clara Lbr. Co.*, 173 N. Y. 149.

44. *Prospect Park, etc.*, R. Co. v. *Coney Island, etc.*, R. Co., 144 N. Y. 152.

S. Verbal contracts.**1. In general.**

The general statutory provision, commonly known as the Statute of Frauds, so far as it relates to transactions in real estate, is contained in section 259 of the Real Property Law, and provides as follows: "A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor or grantor, or by his lawfully authorized agent." A contract rendered void by this section, unless saved by part performance, cannot be enforced in an action of specific performance.⁴⁵ A court of equity cannot decree the specific performance of a parol contract to convey real estate, where the executory vendee has never entered into possession of the premises, and the Statute of Frauds is set up as a defense.⁴⁶ A parol promise to hold certain land and to reconvey on request, is within the Statute of Frauds.⁴⁷ The bar of the Statute of Frauds may be urged by either the seller or purchaser.⁴⁸

2. Sufficiency of note or memorandum.

In order to conform to the Statute of Frauds, as well as to the general requirements of equity jurisdiction, a contract must be reasonably certain in its terms.⁴⁹ The equitable remedy of specific performance cannot be invoked unless the writing contains a reasonably definite description

45. *Woolley v. Stewart*, 222 N. Y. 347; *Pershall v. Elliott*, 249 N. Y. 183; *Ludwig v. Bungart*, 48 App. Div. 613, 63 N. Y. Supp. 91; *Jayne v. Brown*, 93 App. Div. 617, 88 N. Y. Supp. 589; *Czermak v. Wetzel*, 114 App. Div. 816, 100 N. Y. Supp. 167; *Pounds v. Egbert*, 117 App. Div. 756, 102 N. Y. Supp. 1079; *Gross v. Gorsch*, 124 App. Div. 834, 109 N. Y. Supp. 234; *Blumenfeld v. Aronson*, 196 App. Div. 189, 187 N. Y. Supp. 585; *Ankele v. Blankmer*, 197 App. Div. 684, 189 N. Y. Supp. 876, appeal dismissed, 232 N. Y. 557; *Hefford v. Lichtman*, 116 Misc. 692, 190 N. Y. Supp. 554;

Ladd v. Stevenson, 43 Hun 541, 6 St. Rep. 653, affirmed, 112 N. Y. 325; *Devinney v. Corey*, 1 Silv. Sup. 148, 5 N. Y. Supp. 289, affirmed, 127 N. Y. 655.

46. *Mitchell v. Niagara, etc., Power Co.*, 191 App. Div. 276, 181 N. Y. Supp. 899.

47. *Palmer v. Rotary Realty Co.*, 178 App. Div. 907, 164 N. Y. Supp. 1104.

48. *300 West End Ave. Corp. v. Warner*, 223 App. Div. 267, 228 N. Y. Supp. 44, affirmed 250 N. Y. 221.

49. See, *infra*, II-T, Certainty of contract.

of the premises.⁵⁰ If parol evidence is necessary to make it definite, courts of equity will not enforce it.⁵¹ By positive command of the statute, it must express the consideration.⁵² But, if it contains all the necessary elements, it may be enforced however informal it may be.⁵³

The names of both parties should appear in the writing;⁵⁴ but it is not necessary that it should appear therefrom which is the vendor and which is the purchaser.⁵⁵ The relation of the parties may be shown by parol evidence.⁵⁶

The form of the agreement is not important, provided it contains the necessary elements.⁵⁷ It may consist of several papers signed by the party sought to be charged thereby;⁵⁸ but when two or more papers which together are claimed to constitute the contract are signed by different persons, they will not have that effect unless they are physically joined, or the intention to unite them appears on the face of the papers.⁵⁹

The contract must be subscribed by the owner, or his lawfully authorized agent.⁶⁰ It is sufficient if the owner has subscribed the copy of the contract which he himself retains.⁶¹ It need not be signed by both parties, signing by the party sought to be bound together with acceptance by

50. *Cooley v. Lobdell*, 153 N. Y. 596.

51. *Mandel v. Guardian Holding Co.*, 200 App. Div. 767, 193 N. Y. Supp. 777, appeal dismissed, 234 N. Y. 533; *Koppe v. Gallagher*, 133 Misc. 79, 230 N. Y. Supp. 680. See, *infra*, II-S-4, Effect of parol evidence rule.

52. *Cooley v. Lobdell*, 153 N. Y. 596; *Pershall v. Elliott*, 249 N. Y. 183.

53. *Lukawski v. Devlin*, 243 N. Y. 583.

54. *Tobias v. Lynch*, 192 App. Div. 54, 182 N. Y. Supp. 643, affirmed, 233 N. Y. 515; *Baker v. Kilburn*, 77 Misc. 624, 137 N. Y. Supp. 512; *Walsh v. Van Amringe*, 103 Misc. 350, 171 N. Y. Supp. 509, affirming, 185 App. Div. 944, 172 N. Y. Supp. 925; *Dawson v. Margolies*, 126 Misc. 39, 212 N. Y. Supp. 471.

55. *Tobias v. Lynch*, 192 App. Div. 54, 182 N. Y. Supp. 643, affirmed, 233 N. Y. 515.

56. *Tobias v. Lynch*, 192 App. Div. 54, 182 N. Y. Supp. 643, affirmed, 233 N. Y. 515.

57. *Martin v. Colby*, 42 Hun 1, 3 St. Rep. 415, 25 Week. Dig. 358.

58. *Marks v. Cowdin*, 226 N. Y. 138; *Van Name v. Queens Land, etc., Co.*, 130 App. Div. 857, 115 N. Y. Supp. 905.

59. *Dawson v. Margolies*, 126 Misc. 39, 212 N. Y. Supp. 471.

60. *Initials*.—Although a contract is signed with the initials of the agents of the parties, an action thereon can be maintained against the principals, provided the instrument was not sealed. *Pelletreau v. Brennan*, 113 App. Div. 806, 99 N. Y. Supp. 955.

61. *Brune v. Von Lehn*, 112 Misc. 342, 184 N. Y. Supp. 129, affirmed, 193 App. Div. 897, 183 N. Y. Supp. 954.

the other party, being sufficient.⁶² If signed by the owner and accepted by the purchaser, it may be enforced by the owner, although it is not signed by the purchaser.⁶³

The signing of the contract by an agent of the owner is sufficient to satisfy the statute, but this practice frequently leaves open for future litigation the question whether the agent was "authorized."⁶⁴ It is not necessary that the authorization of the agent be expressed in a written instrument.⁶⁵ A letter signed by the attorney for the owner of land inclosing a proposed written contract for the sale thereof may be a sufficient note or memorandum in writing within the meaning of the Statute of Frauds.⁶⁶ A contract executed by one member of a partnership providing for the sale of partnership realty, may be enforced against both members of the firm, or by the members of the partnership against the purchaser.⁶⁷ It has been held that a contract executed by an alleged agent must name the owner and purport to be made in his behalf;⁶⁸ but, on the other hand, it has been thought that the name of the principal need not appear in the writing, and that an undisclosed principal may be held.⁶⁹ If the contract is under seal, an undisclosed principal will not be bound.⁷⁰

3. Fraud.

The purpose of the Statute of Frauds was the prevention of frauds and perjuries.⁷¹ Hence the courts refuse to permit the statute to be made an instrument for the accomplishment of fraud.⁷² This rule is but another form of stating the

62. *Newburger v. American Surety Co.*, 242 N. Y. 134. And see, *infra*, II-U, Mutuality.

63. *Boehly v. Mansing*, 52 Misc. 382, 102 N. Y. Supp. 171.

64. See, *supra*, II-P, Unauthorized contracts.

65. *Newton v. Bronson*, 13 N. Y. 537.

66. *Le Long v. Siebrecht*, 196 App. Div. 74, 187 N. Y. Supp. 150.

67. *McWhorter v. McMahan, Clarke*, 400, affirmed, 10 Paige 386. See also, *More v. Smedburgh*, 8 Paige 600, affirmed, 26 Wend. 238.

68. *Baker v. Kilburn*, 77 Misc. 624, 137 N. Y. Supp. 512.

69. *Byrne v. McDonough*, 114 Misc.

529, 186 N. Y. Supp. 807, affirmed 198 App. Div. 908, 188 N. Y. Supp. 913; *Diamond v. Talbott*, 123 Misc. 339, 205 N. Y. Supp. 309.

70. *Crowley v. Lewis*, 239 N. Y. 264; *Blanchard v. Archer*, 93 App. Div. 459, 87 N. Y. Supp. 665; *Van Allen v. Peabody*, 112 App. Div. 57, 97 N. Y. Supp. 1119.

71. *Wheeler v. Reynolds*, 66 N. Y. 227.

72. *Ryan v. Dox*, 34 N. Y. 307; *Murphy v. Whitney*, 69 Hun 573, 23 N. Y. Supp. 1134, 53 St. Rep. 334, affirmed, 140 N. Y. 541; *Jayne v. Brown*, 93 App. Div. 617, 88 N. Y. Supp. 589.

rule that part performance avoids the Statute of Frauds. If there is part performance, there is fraud; if there is no part performance, there is no such fraud as will relieve from the Statute of Frauds. In order to give the statute any vitality, the courts necessarily hold that the refusal to perform a verbal contract which is void under the statute is not a fraud.⁷³

Where a mortgage for much less than the actual value of the real estate is in process of foreclosure and the mortgagor enters into an oral agreement with a third party, whereby the mortgagor is to refrain from bidding at the foreclosure sale or securing any one else to bid, and the third party is to be allowed to bid in the property and to reconvey it to the mortgagor upon certain payments being made, the oral agreement may be specifically performed and the third party thus securing the title to the property will be compelled to convey the property to the mortgagor.⁷⁴ In such a case the law will hold the purchaser as a trustee *ex maleficio*.⁷⁵ But with small change in the facts, equity may decline to interfere. If the mortgagor has not in reliance on the contract agreed to refrain from attending the sale or from procuring other bidders, or from otherwise protecting his rights, equity will not avoid the statute.⁷⁶

In the absence of special considerations justifying equitable jurisdiction, an oral promise by a grantee of property to reconvey to the grantor, will not be enforced.⁷⁷ One who conveys his premises to a relative for the purpose of embarrassing his creditors, cannot enforce an agreement by such relative to reconvey the premises.⁷⁸ Not only does the statute bar the relief, but it is against public policy to

73. *Levi v. Brush*, 45 N. Y. 589; *Wheeler v. Reynolds*, 66 N. Y. 227; *Bullenkamp v. Bullenkamp*, 43 App. Div. 510, 60 N. Y. Supp. 84; *Ludwig v. Bungart*, 26 Misc. 247, 56 N. Y. Supp. 51, reversed on other grounds, 48 App. Div. 613, 63 N. Y. Supp. 91; *Williamsburg City F. Ins. Co. v. Lichtenstein*, 98 Misc. 342, 164 N. Y. Supp. 345.

74. *Ryan v. Dox*, 34 N. Y. 307.

75. *Ryan v. Dox*, 34 N. Y. 307.

76. *Levi v. Brush*, 45 N. Y. 589;

Wheeler v. Reynolds, 66 N. Y. 227; *Ankele v. Blankmer*, 197 App. Div. 684, 189 N. Y. Supp. 876, appeal dismissed, 232 N. Y. 557; *Lathrop v. Hoyt*, 7 Barb. 59.

77. *Bullenkamp v. Bullenkamp*, 43 App. Div. 510, 60 N. Y. Supp. 84; *Ankele v. Blankmer*, 197 App. Div. 684, 189 N. Y. Supp. 876, appeal dismissed, 232 N. Y. 557.

78. *Simis v. Simis*, 146 App. Div. 655, 131 N. Y. Supp. 460.

countenance such conduct.⁷⁹ A confidential relation between the parties will sometimes supply the equitable element which is necessary to justify a court of equity in decreeing a reconveyance.⁸⁰ When a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court to prevent the abuse of confidence will grant relief.⁸¹ Thus, where a husband, for the purpose of qualifying his wife as a surety on his obligation, conveyed real estate to her, with the understanding that it would be reconveyed to him when the obligation had been discharged, it was held that equity would compel the reconveyance.⁸²

Where two persons enter into a verbal contract to purchase certain real estate, with moneys contributed by each of them, upon the understanding that they are to hold the property as tenants in common, and under the arrangement each contributes to the payment of liens on the premises and each exercises rights of ownership therein, if the one who has taken the legal title to the property in his own name seeks to deprive the other of his rights in the premises, a court of equity will interfere and require the performance of the verbal contract.⁸³ Relief may be granted in such cases where the parties are husband and wife.⁸⁴

Where a vendee is induced by fraudulent representations to accept a deed which does not include all of the lands which the vendor orally agreed to convey, and such vendee pays the consideration and enters into possession of the premises, he may have specific performance of the oral agreement, although no improvements have been made by him on that part of the premises not included in the deed.⁸⁵

Where a party obtains title to real property upon a verbal agreement to transfer in payment of the same some other

79. *Simis v. Simis*, 146 App. Div. 655, 131 N. Y. Supp. 460.

80. *Jeremiah v. Pitcher*, 26 App. Div. 402, 49 N. Y. Supp. 788, affirmed without opinion, 163 N. Y. 574.

81. *Jeremiah v. Pitcher*, 26 App. Div. 402, 49 N. Y. Supp. 788, affirmed without opinion, 163 N. Y. 574.

82. *Gallagher v. Gallagher*, 135 App. Div. 457, 120 N. Y. Supp. 18, affirmed without opinion, 202 N. Y. 572.

83. *Traphagen v. Burt*, 67 N. Y. 30; *Quinn v. Quinn*, 69 App. Div. 598, 75 N. Y. Supp. 83; *Thomas v. Robert*, 123 Misc. 76, 204 N. Y. Supp. 217.

84. *Gage v. Gage*, 13 App. Div. 565, 43 N. Y. Supp. 810.

85. *Beardsley v. Duntley*, 69 N. Y. 577.

property, real or personal, the Statute of Frauds does not apply, and equity will enforce the agreement.⁸⁶

4. Effect of "parol evidence" rule.

Any statement which is required by the Statute of Frauds to be inserted in the note or memorandum of the contract, cannot be shown by parol evidence.⁸⁷ Moreover, an action for the specific performance of an oral contract may fail, not only because of the Statute of Frauds, but because of the existence of a written contract. The rule forbidding the receipt of oral evidence tending to vary a written contract may preclude the proof.⁸⁸ And in an action on a written contract, the plaintiff will not be permitted to prove a contract, partly written and partly in parol.⁸⁹ Similarly, the writing may bar the defendant from showing inconsistent oral transactions.⁹⁰ Thus, he will not be permitted to show that a prior oral contract, not the written contract pleaded in the complaint, is the engagement between the parties.⁹¹ Or, if the written contract is complete, a collateral oral agreement for the performance of an act not entirely independent of the written engagement, cannot be shown.⁹²

5. Part performance, in general.

It is the general rule in equity that one who, relying on a verbal contract otherwise proscribed by the Statute of Frauds, has performed in part the acts to be done by him, may have a specific performance of the contract.⁹³ In sec-

86. *Roberge v. Winne*, 144 N. Y. 709.

87. *Tobias v. Lynch*, 192 App. Div. 54, 182 N. Y. Supp. 643, affirmed, 233 N. Y. 515; *Mandel v. Guardian Holding Co.*, 200 App. Div. 767, 193 N. Y. Supp. 777, appeal dismissed, 234 N. Y. 533; *Baker v. Kilburn*, 77 Misc. 624, 137 N. Y. Supp. 512; *Schubach v. Konshmer*, 114 Misc. 354, 186 N. Y. Supp. 400; *Milliman v. Huntington*, 68 Hun 258, 22 N. Y. Supp. 997, 52 St. Rep. 273.

88. *Brantingham v. Hoff*, 174 N. Y. 53, reversing, 67 App. Div. 621, 73 N. Y. Supp. 643.

89. *Steiner v. Hallman*, 7 App. Div.

248, 40 N. Y. Supp. 36, 74 St. Rep. 647.

90. *Newburger v. American Surety Co.*, 242 N. Y. 134; *Tobias v. Lynch*, 192 App. Div. 54, 182 N. Y. Supp. 643, affirmed, 233 N. Y. 515; *Wright v. Weeks*, 3 Bosw. (16 Super. Ct.) 372, affirmed, 25 N. Y. 153.

91. *Deitzman v. Rembrandt Realty Co.*, 210 App. Div. 484, 206 N. Y. Supp. 161.

92. *Mitchell v. Lath*, 247 N. Y. 377.

93. *Malins v. Brown*, 4 N. Y. 403; *Ryan v. Dox*, 34 N. Y. 307; *Freeman v. Freeman*, 43 N. Y. 34; *Harsha v. Reid*, 45 N. Y. 415; *Johnson v. Brooks*, 93 N. Y. 337; *Smith v. Smith*, 125

tion 270 of the Real Property Law, the principle is codified as follows: "Nothing contained in this article abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance." Obviously, a "full" performance has the same effect as a "part" performance.⁹⁴ The rule is plain, but considerable difficulty is encountered in determining whether the acts in a particular case are sufficient to constitute "part performance."

The underlying reason for the "part performance" rule is that the Statute of Frauds was designed to prevent frauds and perjuries, and courts of equity will not permit the statute to be an instrumentality of fraud.⁹⁵ If relief from fraud and the literal enforcement of the Statute of Frauds are inconsistent, courts of equity prefer to relieve from the fraud. One is deemed to withdraw himself from the policy and defense of the Statute of Frauds, or to waive its protection, if he induces or permits without remonstrance another party to the agreement to do acts, pursuant to and in reliance upon the agreement, to such an extent and so substantial in quality as to irremediably alter his position and to make the interposition of the statute a fraud.⁹⁶

- N. Y. 224; *Young v. Overbaugh*, 145 N. Y. 158; *Canda v. Totten*, 157 N. Y. 281; *Harris v. Sherall*, 230 N. Y. 343; *Jeremiah v. Pitcher*, 26 App. Div. 402, 49 N. Y. Supp. 788, affirmed without opinion, 163 N. Y. 574; *Everdell v. Hill*, 58 App. Div. 151, 68 N. Y. Supp. 719; *Doty v. Rensselaer County Mutual Fire Ins. Co.*, 188 App. Div. 29, 175 N. Y. Supp. 55; *Q. R. S. Co. v. Phillippis-Jones Corp.*, 194 App. Div. 170, 185 N. Y. Supp. 127, affirmed, 233 N. Y. 626; *Sinclair v. Purdy*, 213 App. Div. 439, 210 N. Y. Supp. 208; *Roedmann v. Hertel*, 78 Misc. 55, 138 N. Y. Supp. 375; *Williston v. Williston*, 41 Barb. 635; *Wetmore v. White*, 2 Cai. Cas. 87; *Godine v. Kidd*, 64 Hun 585, 29 Abb. N. C. 36, 19 N. Y. Supp. 335, 46 St. Rep. 813; *Murphy v. Whitney*, 69 Hun 573, 23 N. Y. Supp. 1134, 53 St. Rep. 334, affirmed, 140 N. Y. 541; *Kincaid v. Bincaid*, 85 Hun 141, 32 N. Y. Supp. 476, 65 St. Rep. 661; *Richmond v. Foote*, 3 Lans. 244; *White's Bank v. Farthing*, 10 St. Rep. 830; *Benedict v. Phelps*, 2 Week. Dig. 150.
- 94.** *Jeremiah v. Pitcher*, 26 App. Div. 402, 49 N. Y. Supp. 788, affirmed without opinion, 163 N. Y. 574; *Korminsky v. Korminsky*, 2 Misc. 138, 21 N. Y. Supp. 611; *Bennett v. Abrams*, 41 Barb. 619.
- 95.** *Malins v. Brown*, 4 N. Y. 403; *Ryan v. Dox*, 34 N. Y. 307; *Freeman v. Freeman*, 43 N. Y. 34; *Canda v. Totten*, 157 N. Y. 281; *Jeremiah v. Pitcher*, 26 App. Div. 402, 49 N. Y. Supp. 788, affirmed without opinion, 163 N. Y. 574; *Veeder v. Horstman*, 85 App. Div. 154, 83 N. Y. Supp. 99; *Lowry v. Tew*, 3 Barb. Ch. 407; *Wetmore v. White*, 2 Cai. Cas. 87; *Sherman v. Scott*, 27 Hun 331, 2 Civ. Proc. (Browne) 366; *White's Bank v. Farthing*, 10 St. Rep. 830.
- 96.** *Woolley v. Stewart*, 222 N. Y. 347.

6. Part performance, what constitutes.

Not every act of part performance will move a court of equity, though legal remedies are inadequate, to enforce an oral agreement affecting rights in land.⁹⁷ A part performance such as will avoid the effect of the Statute of Fraud, must be substantial. In order to constitute a part performance within the rule, the acts shown must be so clear, certain and definite in their object and design as to refer to a complete and perfect agreement of which they are a part execution.⁹⁸ They must be unequivocal in their character, and they must have reference to the carrying out of the identical agreement.⁹⁹ They must have been done in pursuance or fulfillment of the parol agreement, or in just reliance thereon. They must have been done with a view to the agreement, and be referable exclusively thereto.¹ Equity will grant relief only when the acts unequivocally refer to the existence of a contract, and when the acts without the aid of words of promise point with certainty and definiteness to the existence of a contract.² Acts which admit of explanation without reference to the alleged oral contract or a contract of the same general nature and purpose, are not, in general, admitted to constitute a part performance.³ But, where a contract has been partly performed by acts which are not exclusively referable to the contract, but are of such a nature that if the contract should not be performed the person would be practically defrauded by reason of the acts which he had done in last performance of the contract, and in reliance upon it, specific performance should be decreed.⁴

97. *Burns v. McCormick*, 233 N. Y. 230.

98. *Woolley v. Stewart*, 222 N. Y. 347.

99. *Woolley v. Stewart*, 222 N. Y. 347; *Pershall v. Elliott*, 249 N. Y. 183; *Everdell v. Hill*, 58 App. Div. 151, 68 N. Y. Supp. 719; *Richmond v. Foote*, 3 Lans. 244.

1. *Miller v. Ball*, 64 N. Y. 286; *Burns v. McCormick*, 233 N. Y. 230; *Todd v. Pratt*, 149 App. Div. 459, 133 N. Y. Supp. 949; *Life Savers' Club v. Mosher*, 125 Misc. 341, 209 N. Y. Supp. 741; *Byrne v. Romaine*, 2 Edw.

Ch. 445; *Jervis v. Smith*, Hoff. Ch. 470; *McIneres v. Hogan*, 61 How. Pr. 446; *Lord v. Underdunk*, 1 Sandf. Ch. 46; *Wolfe v. Frost*, 4 Sandf. Ch. 72.

2. *Sinclair v. Purdy*, 213 App. Div. 439, 210 N. Y. Supp. 208; *Phillips v. Thompson*, 1 Johns. Ch. 131.

3. *Woolley v. Stewart*, 222 N. Y. 347; *Burns v. McCormick*, 233 N. Y. 230; *Life Savers' Club v. Mosher*, 125 Misc. 341, 209 N. Y. Supp. 741; *McIneres v. Hogan*, 61 How. Pr. 446; *Wolfe v. Frost*, 4 Sandf. Ch. 72.

4. *Veeder v. Horstman*, 85 App. Div. 154, 83 N. Y. Supp. 99.

That will be considered a part performance which puts a party in a situation which is a fraud upon him, unless the agreement is executed.⁵ On the other hand, nothing will be deemed part performance which does not put the party into a situation which is a fraud, hardship or deceit upon him unless the contract be performed.⁶

7. Part performance, entry into possession, improvements, etc.

There may be cases where equity, in order to prevent the perfection of a fraud, will consider the acts of the defrauded party a part performance, although he has not entered into possession of the premises involved in a suit for specific performance. Only in unusual circumstances will such a holding be made, for it is the general rule that there is no part performance if the plaintiff has not entered into possession.⁷

The mere fact that one has entered into possession of premises which another by oral contract has agreed to convey to him, is not a sufficient act of part performance to take the case out of the Statute of Frauds.⁸ Some addi-

5. *Malins v. Brown*, 4 N. Y. 403; *Miller v. Ball*, 64 N. Y. 288; *Murphy v. Whitney*, 69 Hun 573, 23 N. Y. Supp. 1134, 53 St. Rep. 334, affirmed, 140 N. Y. 541; *Kincaid v. Kincaid*, 85 Hun 141, 32 N. Y. Supp. 476, 65 St. Rep. 661.

6. *Malins v. Brown*, 4 N. Y. 403; *Miller v. Ball*, 64 N. Y. 286; *Pershall v. Elliott*, 249 N. Y. 133; *Cooley v. Lobdell*, 82 Hun 98, 31 N. Y. Supp. 202, 63 St. Rep. 603, affirmed, 153 N. Y. 596; *Wolfe v. Frost*, 4 Sandf. Ch. 72.

Delivery of muniments of title.—The fact that the title deeds, abstracts of title and other papers were delivered for examination as provided for in the contract and that the plaintiff stood in readiness to perform is not such part performance as will afford relief in equity. *Drake v. Sop*, 131 Misc. 573, 227 N. Y. Supp. 576.

7. *Devinney v. Corey*, 1 Silv. Sup. 148, 5 N. Y. Supp. 289, affirmed without opinion, 127 N. Y. 655. "We think

there has been no case in this state in which specific performance of such a contract has been decreed on the ground of part performance, when entry into possession has not constituted a leading feature of the part performance relied upon." *Devinney v. Corey*, 1 Silv. Sup. 148, 5 N. Y. Supp. 289, affirmed without opinion, 127 N. Y. 655.

8. *Miller v. Ball*, 64 N. Y. 286; *German v. Machin*, 6 Paige 288. Compare, *Smith v. Underdunk*, 1 Sandf. Ch. 579.

Residence by a married woman, with her husband, on premises which he had orally contracted for a good consideration to convey to her, and of which he continued in possession the same after the contract was made as before, does not constitute such a possession as will entitle her to enforce her contract. *Cooley v. Lobdell*, 153 N. Y. 596.

If the oral contract is repudiated by the owner before possession is

tional act or acts, such as will justify the court in determining that a denial of relief will work a fraud, must co-operate with the possession.⁹ Of such are the making of improvements to the property, and hence it is held that an entry into possession coupled with the making of improvements, constitute a part performance within the rule.¹⁰ The remedy will not be denied merely because the expenditures are less than the rental value of the premises.¹¹

To render improvements made by the purchaser of land under an oral contract of sale acts of part performance which will estop the vendor from setting up the Statute of Frauds as a bar to the enforcement of the contract, they must be substantial and permanent in character, such as would not have been made except in reliance upon the contract, and the loss thereof a sacrifice to the purchaser.¹²

Where a vendee of real estate under a parol contract relies upon his entry into possession to take it out of the Statute of Frauds, his entry must be connected with and referable to the contract, and it must clearly appear that he took possession by the known permission of the vendor. If possession be taken without such permission, express or implied, it is no foundation for relief in equity according to any of the authorities. The possession must refer to the agreement

taken, specific performance cannot be granted. *Czermak v. Wetzel*, 114 App. Div. 816, 100 N. Y. Supp. 167.

9. "Taking possession under a parol agreement with the consent of the vendor, accompanied with other acts which cannot be recalled so as to place the party taking possession in the same situation that he was before, has always been held to take such agreement out of the operation of the statute." *Miller v. Ball*, 64 N. Y. 286.

10. *Freeman v. Freeman*, 43 N. Y. 34; *Miller v. Ball*, 64 N. Y. 286; *Cooley v. Lobdell*, 153 N. Y. 596; *Gibbs v. J. M. Horton Ice Cream Co.*, 61 App. Div. 621, 71 N. Y. Supp. 193; *Luessen v. Morich*, 72 App. Div. 443, 76 N. Y. Supp. 663; *Veeder v. Horstman*, 85 App. Div. 154, 83 N. Y. Supp. 99; *Drake v. Sop*, 131 Misc. 573, 227

N. Y. Supp. 576; *Swartout v. Burr*, 1 Barb. 495; *Williston v. Williston*, 41 Barb. 635; *Wetmore v. White*, 2 Cai. Cas. 87; *Young v. Overbaugh*, 76 Hun 151, 27 N. Y. Supp. 553, 57 St. Rep. 310, affirmed, 145 N. Y. 158; *Dodge v. Miller*, 81 Hun 102, 30 N. Y. Supp. 726, 62 St. Rep. 681; *Parkhurst v. Van Cortland*, 14 Johns. 15, reversing, 1 Johns. Ch. 273; *Van Epps v. Clock*, 7 N. Y. Supp. 21, 25 St. Rep. 896; *Cordes v. Kenney*, 7 N. Y. Supp. 849, 28 St. Rep. 393; *Town v. Needham*, 3 Paige 545.

11. *Young v. Overbaugh*, 76 Hun 151, 27 N. Y. Supp. 553, 57 St. Rep. 310, affirmed, 145 N. Y. 158.

12. *Cooley v. Lobdell*, 153 N. Y. 596; *Cooley v. Lobdell*, 82 Hun 98, 31 N. Y. Supp. 202, 63 St. Rep. 603, affirmed, 153 N. Y. 596.

of which performance is sought.¹³ But, if the owner acquiesces in the possession of the occupant, and there is no contract between the parties other than the oral contract, the inference is permitted that possession was taken and held under the oral agreement.¹⁴

Although an oral lease for a term exceeding one year is void under section 259 of the Real Property Law, if the tenant in reliance on the lease enters into possession and makes substantial improvements, the court may direct the specific performance of the lease.¹⁵ If, however, the term of the lease, not the making of any lease, is the issue involved, the tenant may have difficulty in showing that the acts of possession and improvements on which he relies to take the case out of the Statute of Frauds, refer to the lease he claims. In such a case the possession is of no avail to the tenant, and unless the improvements are of exceptional character, they may refer equally well to the lease admitted by the landlord as to that claimed by the tenant. Under such circumstances the tenant may fail.¹⁶ Or, if the tenant claims an option to purchase, acts of possession or improvement which are consistent with a mere tenancy, do not constitute a part performance within the rule.¹⁷

Entry into possession, coupled with substantial payments on the purchase price, have been held sufficient to bring the case within the "part performance rule."¹⁸ The payment of taxes, insurance, interest on incumbrances on premises,

13. *Van Epps v. Clock*, 7 N. Y. Supp. 21, 25 St. Rep. 896; *Lord v. Underdunk*, 1 Sandf. Ch. 46; *Harris v. Knickerbacker*, 5 Wend. 638, reversing, 1 Paige 209.

14. *Jarvis v. Smith*, Hoff. Ch. 470; *Richmond v. Foote*, 3 Lans. 244.

15. *Veeder v. Horstman*, 85 App. Div. 154, 83 N. Y. Supp. 99; *Schiemer v. Rehill*, 57 Misc. 439, 109 N. Y. Supp. 745; *Roedmann v. Hertel*, 78 Misc. 55, 138 N. Y. Supp. 375; *Stone v. 434 Broadway Realty Corps.*, 113 Misc. 178, 184 N. Y. Supp. 116; *Wendell v. Stone*, 39 Hun 382.

16. *Czermak v. Wetzel*, 114 App. Div. 816, 100 N. Y. Supp. 167; *Byrne*

v. Romaine, 2 Edw. Ch. 445; *McIneres v. Hogan*, 61 How. Pr. 446.

17. *Bevans v. Young*, 13 N. Y. Supp. 497, 38 St. Rep. 41.

18. *Miller v. Ball*, 64 N. Y. 296; *Dunckel v. Dunckel*, 141 N. Y. 427; *Gibbs v. J. N. Horton Ice Cream Co.*, 61 App. Div. 621, 71 N. Y. Supp. 193; *Merithew v. Andrews*, 44 Barb. 200; *Cooper v. Monroe*, 77 Hun 1, 28 N. Y. Supp. 222, 59 St. Rep. 418; *Pawling v. Pawling*, 86 Hun 502, 33 N. Y. Supp. 780, 67 St. Rep. 526, affirmed without opinion, 150 N. Y. 574; *Richmond v. Foote*, 3 Lans. 244; *Biden v. James*, 3 St. Rep. 734, 25 Week. Dig. 141, affirmed without opinion, 111 N. Y. 680.

and making of repairs, afford additional basis for a claim of part performance.¹⁹

In case of an exchange of parcels, a deed by one accompanied by a change in possession of both parcels, is sufficient part performance to compel the delivery of the deed of the other parcel.²⁰

Part performance, not only furnishes a means for avoiding the effect of the Statute of Frauds, but also affords a consideration for the agreement to convey.²¹ Thus, if an owner agrees to give premises to another person and such donee in reliance thereon enters upon the premises, cultivates and improves them for a period of years, the promised gift is based on an ample consideration and may be enforced by specific performance.²² The fact that during the occupancy under the oral gift the rental value of the premises exceeded his expenditure for improvements, does not deprive him of equitable relief.²³

8. Part performance, payment of consideration.

The payment of a part of the consideration, while it is a part performance of the contract, is not such a part performance as justifies a court of equity in avoiding the Statute of Frauds.²⁴ This is clearly true, in any case where

19. *Canda v. Totten*, 157 N. Y. 281.

20. *Beebe v. Dowd*, 22 Barb. 255;
Bennett v. Abrams, 41 Barb. 619.

21. *Freeman v. Freeman*, 43 N. Y. 34;
Van Arsdale v. Perry, 21 Week. Dig. 116.

22. *Lobdell v. Lobdell*, 36 N. Y. 327;
Freeman v. Freeman, 43 N. Y. 34;
Young v. Overbaugh, 145 N. Y. 158;
Messiah Home v. Rogers, 212 N. Y. 315;
McCray v. McCray, 30 Barb. 633;
Patterson v. Copeland, 52 How. Pr. 460;
Knapp v. Hungerford, 7 Hun 588;
Erwin v. Erwin, 17 N. Y. Supp. 442,
44 St. Rep. 6, affirmed on opinion below,
139 N. Y. 616; *Van Arsdale v. Perry*,
21 Week. Dig. 116.

23. *Young v. Overbaugh*, 145 N. Y. 158.
"It would be very unequitable to deprive the agreement of its obligatory character, merely because, during the time of the occupation of

the defendant under the parol promise, the fair rental value of the premises would amount, in the aggregate, to a sum in excess of the amount altogether expended. If there was the promise to give the property, accompanied by the delivery of possession to the defendant and expenditures in permanent improvements made, in reliance upon the promise, injury will be presumed to follow by a failure to perform it. In enforcing such a promise, equity aims at preventing a fraud upon the donee and regards the case as taken out of the operation of the statute by the part performance."
Young v. Overbaugh, 145 N. Y. 158.

24. *Rosen v. Rosen*, 13 Misc. 565,
34 N. Y. Supp. 467, 68 St. Rep. 370;
Williamsburg City F. Ins. Co., v. Lichtenstein, 98 Misc. 342, 164 N. Y. Supp. 345; *Fannin v. McMullen*, 2

the aggrieved party can recover in an action at law any payments he may have made. If, however, a substantial part of the consideration is paid and possession of the premises is taken under the contract, it is generally held that the case is not within the operation of the Statute of Frauds.²⁵ Or, if the vendor has become insolvent or if the purchaser's remedy at law is barred by the Statute of Limitations, there may be ground for a resort to equity.²⁶

The payment of the *entire* purchase price brings into application practically the same principles as a part payment. Thus, it is said that the payment of the consideration is not sufficient to authorize the specific performance of the contract, unless the circumstances are such that an action at law for the recovery of the payments will not afford an adequate remedy.²⁷ Some of the earlier cases, however, expressed the view that full payment, of itself, justified the relief.²⁸ The payment of the consideration coupled with an entry into possession of the premises, will generally take the case out of the Statute of Frauds.²⁹ This conclusion is undisputable when the occupant has also made improvements to the premises.³⁰

Abb. Pr. N. S. 224; Haight v. Child, 34 Barb. 186; Morrill v. Cooper, 65 Barb. 512.

A deposit made on an old lease cannot be treated as a part performance of an alleged new lease, where the old lease had not expired, and the landlord was not bound to return the deposit until the expiration of the lease which was subsequent to the date when an action to enforce the specific performance of a contract for a new lease was instituted. Blumenfeld v. Aronson, 196 App. Div. 189, 187 N. Y. Supp. 585.

25. See the preceding paragraph.

26. Cooper v. Monroe, 77 Hun 1, 28 N. Y. Supp. 222, 59 St. Rep. 413.

27. Winchell v. Winchell, 100 N. Y. 159; Duncel v. Duncel, 141 N. Y. 427; Cooley v. Lobdell, 153 N. Y. 596; Braun v. Ochs, 77 App. Div. 20, 79 N. Y. Supp. 100; Cooper v. Monroe, 77 Hun 1, 28 N. Y. Supp. 222, 59 St.

Rep. 418; Cooley v. Lobdell, 82 Hun 98, 31 N. Y. Supp. 202, 63 St. Rep. 603, affirmed, 153 N. Y. 596; Pawling v. Pawling, 86 Hun 502, 33 N. Y. Supp. 780, 67 St. Rep. 526, affirmed without opinion, 150 N. Y. 574; Richmond v. Foote, 3 Lans. 244; Devinney v. Corey, 1 Silv. Sup. 148, 5 N. Y. Supp. 289, affirmed without opinion, 127 N. Y. 655; Schoonmaker v. Bonny, 6 St. Rep. 122, 26 Week. Dig. 273, reversed on other grounds, 119 N. Y. 565. See also, Malins v. Brown, 4 N. Y. 403.

28. Fannia v. McMullen, 2 Abb. Pr. N. S. 224; Morrill v. Cooper, 65 Barb. 512; Wetmore v. White, 2 Cal. Cas. 87; Astor v. L'Amoreux, 4 Sandf. 524, reversed on other grounds, 8 N. Y. 107.

29. Winchell v. Winchell, 100 N. Y. 159; Traphagen v. Traphagen, 40 Barb. 537.

30. Winchell v. Winchell, 100 N. Y. 159.

9. Part performance, services.

Ordinarily, if services have been rendered on the faith of an oral contract, an action at law for the value of the services will furnish an adequate remedy therefor, and hence it is held, as a general proposition, that the rendition of services is not a sufficient part performance to take a case out of the operation of the Statute of Frauds.³¹ On the other hand, it is recognized that there are cases when the remedy by way of damages is inadequate, and in such cases, equity assumes jurisdiction by way of specific performance.³² This is true when the services are of such a special or unusual character that their value cannot be readily ascertained in an action at law.³³ In any event, the statute will not be avoided unless the services which are claimed to constitute a part performance solely and unequivocally refer to the alleged contract.³⁴

10. Part performance, marriage, separation, etc.

When it is sought to compel the specific performance of a contract to convey real property in consideration of the marriage of the parties, the plaintiff is confronted with two separate statutes requiring the agreement to have been committed to writing. Not only is relief affected by the general provisions of section 259 of the Real Property Law affecting the transfer of estates in real property, but section 31 of the Personal Property Law requires an agreement in consideration of marriage to be in writing. It is, therefore, stated as a general rule that marriage is not such a part performance of an oral ante-nuptial contract, the sole consideration of which is marriage, as to take it out of the operation of the Statute of Frauds, and the contract cannot be specifically enforced in a court of equity.³⁵ But, where a husband in consideration of marriage has agreed to give all of his property to his wife, and the agreement

31. *Russell v. Briggs*, 165 N. Y. 500; *Braun v. Ochs*, 77 App. Div. 20, 79 N. Y. Supp. 100; *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Pounds v. Egbert*, 117 App. Div. 756, 102 N. Y. Supp. 1079; *Ludwig v. Bungart*, 26 Misc. 247, 56 N. Y. Supp. 51, reversed on other grounds, 48 App. Div. 613, 63 N. Y. Supp. 91.

32. *Levie v. Fenlon*, 39 Misc. 265, 79 N. Y. Supp. 496.

33. *Rhodes v. Rhodes*, 3 Sandf. Ch. 279.

34. *Burns v. McCormick*, 233 N. Y. 230.

35. *Hunt v. Hunt*, 55 App. Div. 430, 66 N. Y. Supp. 957, affirmed, 171 N. Y. 396; *Brown v. Conger*, 8 Hun 625.

has been executed by the making of a will in accordance with the oral agreement, it may be enforced.³⁶

A parol agreement, by the terms of which a husband promises his wife that, if she will abandon her proceedings to procure a separation from him, to which she deems herself entitled, and will return to and live with him, he will provide for her by will, when followed by her permanent return to him and his execution of such will, constitutes a valid executed contract which she may enforce in equity against his legatees and devisees under a subsequent will made by him in contravention of the parol agreement.³⁷

11. Part performance by defendant.

To bring a case within the operation of the "part performance" it is not necessary to show that the defendant has done any of the acts which he agreed to do.³⁸ Whether a part performance has been shown will depend upon the acts which have been done by the plaintiff in reliance on the contract. If, perchance, the defendant has actually done some acts of part performance, this does not avail the plaintiff. The voluntary performance of part of his agreements does authorize the court to compel the specific performance of the residue.³⁹

36. *Adams v. Swift*, 169 App. Div. 802, 155 N. Y. Supp. 873.

37. *Goldstein v. Goldstein*, 35 Misc. 251, 71 N. Y. Supp. 507.

Providing home for wife.—In an action by a wife upon the theory that after the house in which she had lived for twelve years was destroyed, the insurance money from it should be taken for rebuilding, it appeared that the plaintiff's husband, who had permanently abandoned her, without cause, continued to pay for necessary provisions purchased by her, and also paid the taxes and insurance upon the property. The plaintiff improved the premises from time to time and continued to live in the house until it was destroyed by fire. *Held*, that it was error for the court to exclude evidence of a verbal agreement between the plaintiff and her husband under which she continued to live in the house, to

the effect that he would provide a home for her by giving her the use of the house and grounds during her natural life and pay for her maintenance and support, on the theory that there was not such a part performance of the oral agreement as would justify a specific performance thereof. The plaintiff having forborne for many years to maintain an action for separation, and having forgiven her husband his desertion, and managed and cared for the property as her own, was entitled to the protection of the court and the specific performance of the agreement between them. *Doty v. Rensselaer Co. Mutual F. Ins. Co.*, 194 App. Div. 841, 185 N. Y. Supp. 466.

38. *Freeman v. Freeman*, 43 N. Y. 34.

39. *Harsha v. Reid*, 45 N. Y. 415.

12. Agreement to partition.

When parties have entered into an agreement, partly written and partly oral, settling a dispute and providing for the partition of lands and both parties have acted under the agreement and acquiesced in a partition made by an arbitrator and have remained in possession ever since, equity will enforce the agreement and compel the execution of the conveyances necessary to vest each party with the property awarded to him.⁴⁰

13. Agreement to guarantee.

Suit does not lie to compel the specific performance of an oral agreement by a lessee, made in consideration of a surrender of the lease and his release from further liability, to become a surety for a new tenant. If the guaranty is not void under the Statute of Frauds because of part performance, the promisee's remedy at law is adequate; and, if the guaranty be void under the statute, no suit lies to compel the promisor to perform specifically.⁴¹

14. Agreement to give or discharge security.

The Statute of Frauds applies to an agreement to give a mortgage on certain real estate.⁴² Yet, if a mortgagor secures the satisfaction of an existing mortgage on an oral promise to execute a new mortgage, equity will require him to perform.⁴³ An agreement to give a lien upon land to secure money to be expended in improving it, followed by an actual expenditure of the money, and the improvement contemplated, is so far performed that equity does not regard the Statute of Frauds as a defense to an action to enforce the agreement.⁴⁴ But an agreement to give "satisfactory" security is too indefinite for enforcement in an action of specific performance.⁴⁵

40. *Jones v. Jones*, 118 App. Div. 148, 103 N. Y. Supp. 141.

41. *Goldsmith v. Tolk*, 138 App. Div. 287, 122 N. Y. Supp. 1051, affirmed without opinion, 203 N. Y. 573.

42. *S. W. Straus & Co. v. Felson*, 216 App. Div. 431, 215 N. Y. Supp. 534; *Dodge v. Miller*, 81 Hun 102, 30 N. Y. Supp. 726, 62 St. Rep. 681.

43. *Seymour v. Seymour*, 28 App. Div. 495, 51 N. Y. Supp. 130.

44. *Smith v. Smith*, 125 N. Y. 224; *Dodge v. Miller*, 81 Hun 102, 30 N. Y. Supp. 726, 62 St. Rep. 681.

45. *Ladd v. Stevenson*, 43 Hun 541, 6 St. Rep. 653, affirmed, 112 N. Y. 325.

In a case where there is a part performance, equity may enforce an oral agreement to assign or bequeath a mortgage.⁴⁶ An agreement to discharge the lien of a mortgage on lands, is within the Statute of Frauds,⁴⁷ but a purchaser of the premises who relies on a verbal promise to release the mortgage, may, on the ground of part performance, compel the execution of a release.⁴⁸

15. Contract for testamentary disposition of property.

An agreement to devise lands by will is within the Statute of Frauds. However, in some cases, such a promise, if established by clear and convincing evidence, when acted upon by the promisee so that a refusal of relief would operate as a fraud upon him, may be enforced in an action of specific performance.⁴⁹

16. Pleading of defense.

If the complaint does not show whether the contract was oral or written, the Statute of Frauds is a defense which, in order to be available to the defendant, must be pleaded in his answer.⁵⁰ In passing upon the sufficiency of the complaint, it will not be presumed that the agreement rests in parol.⁵¹ A motion by the defendant for judgment is not a proper procedure for determining the effect of the Statute of Frauds, for, even though the complaint indicates that the contract was oral, there may remain a question of partial performance which should not ordinarily be determined without testimony.⁵²

46. *Bouton v. Welch*, 48 App. Div. 378, 63 N. Y. Supp. 80.

47. *Malins v. Brown*, 4 N. Y. 403.

48. *Malins v. Brown*, 4 N. Y. 403; *Bennett v. Abrams*, 41 Barb. 619.

49. *Bouton v. Welch*, 48 App. Div. 378, 63 N. Y. Supp. 80; *Wilson v. Heath*, 23 Misc. 714, 53 N. Y. Supp. 166; *Salem v. Finney*, 127 Misc. 387, 215 N. Y. Supp. 553; *Sherman v. Scott*, 27 Hun 331, 2 Civ. Proc. (Browne) 366; *Godine v. Kidd*, 64 Hun 585, 29 Abb. N. C. 36, 19 N. Y. Supp. 335, 46 St. Rep. 813. See also, *McCormack v. Halstead*, 132 Misc. 916, 231 N. Y. Supp. 213. And see, *supra*, II-N, Contracts for disposition of property of deceased.

50. *Crane v. Powell*, 139 N. Y. 379; *Matthews v. Matthews*, 154 N. Y. 288; *Agan v. Barry*, 66 App. Div. 101, 72 N. Y. Supp. 667, affirmed without opinion, 175 N. Y. 521; *Banta v. Banta*, 84 App. Div. 138, 82 N. Y. Supp. 113; *Shea v. Keeney*, 155 App. Div. 628, 140 N. Y. Supp. 912; *Lasher v. McDermott*, 173 App. Div. 79, 158 N. Y. Supp. 708, appeal dismissed without opinion, 219 N. Y. 554; *Garfunkel v. Malcolmson*, 217 App. Div. 632, 217 N. Y. Supp. 32.

51. *Shea v. Keeney*, 155 App. Div. 628, 140 N. Y. Supp. 912.

52. *McCormack v. Halstead*, 132 Misc. 916, 231 N. Y. Supp. 213; *Hoff*

T. Certainty of contract.

1. In general.

In order to move a court of equity to grant specific performance of a contract, the contract must be definite and certain in its terms.⁵³ This requirement is in addition to whatever may be required by the Statute of Frauds to be expressed in a writing.⁵⁴ It means more than the requirement that the minds of the parties must have met upon all the substantial elements of the contract.⁵⁵ If the contract is so uncertain and doubtful in its terms that the court cannot enforce it without making a new agreement for the parties, equity will not assume jurisdiction of the controversy.⁵⁶ The contract must be reasonably certain as to its subject-matter, its stipulations, its purposes, its parties and the circumstances under which it was made.⁵⁷ Equity will not

v. Daily Graphic, Inc., 132 Misc. 397, 230 N. Y. Supp. 360.

53. *Buckmaster v. Thompson*, 36 N. Y. 558; *Stanton v. Miller*, 58 N. Y. 192; *Kayser v. Arnold*, 124 N. Y. 674; *Dunckel v. Dunckel*, 141 N. Y. 427; *Stokes v. Stokes*, 148 N. Y. 708; *Light-house v. Third Nat. Bank of Buffalo*, 162 N. Y. 336; *Kingsbridge Imp. Co. v. American E. P. Nat. Bank*, 249 N. Y. 97; *Maher v. Garry*, 3 App. Div. 480, 38 N. Y. Supp. 436, 74 St. Rep. 58, affirming, 15 Misc. 359, 37 N. Y. Supp. 605, 73 St. Rep. 304; *Ripson v. Hart*, 64 App. Div. 593, 72 N. Y. Supp. 791; *Braun v. Ochs*, 77 App. Div. 20, 79 N. Y. Supp. 100; *Geer v. Clark*, 83 App. Div. 292, 82 N. Y. Supp. 87; *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Hanly v. Hanly*, 105 App. Div. 335, 93 N. Y. Supp. 864; *Gross v. Gorsch*, 124 App. Div. 834, 109 N. Y. Supp. 234; *Racich Asbestos Mfg. Co. v. Brooks*, 146 App. Div. 14, 130 N. Y. Supp. 382; *Hart v. Hart*, 188 App. Div. 283, 176 N. Y. Supp. 790; *Ankele v. Blankmer*, 197 App. Div. 684, 189 N. Y. Supp. 876, appeal dismissed, 232 N. Y. 557; *Mandell v. Guardian Holding Co.*, 200 App. Div. 767, 193 N. Y. Supp. 777, appeal dismissed, 234 N. Y. 533; *Wilson v.*

Heath, 23 Misc. 714, 53 N. Y. Supp. 166; *Hall v. Hartford*, 50 Misc. 133, 100 N. Y. Supp. 392; *Davis v. Epoch Producing Co.*, 91 Misc. 631, 155 N. Y. Supp. 597; *Milliman v. Huntington*, 68 Hun 258, 22 N. Y. Supp. 997, 52 St. Rep. 273; *Mehl v. Von Der Wulbeke*, 2 Lans. 267, reversed on other grounds, 46 N. Y. 539; *Van Epps v. Clock*, 7 N. Y. Supp. 21, 25 St. Rep. 896; *Bonnet v. Babbage*, 19 N. Y. Supp. 934; *German v. Machin*, 6 Paige 288; *Harder v. Harder*, 2 Sandf. Ch. 17, 3 N. Y. Leg. Obs. 122; *Jones v. Andreas*, 13 St. Rep. 363, 28 Week. Dig. 206; *Duffield v. Whitlock*, 26 Wend. 55, reversing, Hoff. Ch. 110.

Purchase of bark.—Specific performance of a contract for the purchase of bark cannot be ordered, when the bark to be delivered on the contract is an unascertained and unidentified portion of a larger quantity. *Lighthouse v. Third Nat. Bank of Buffalo*, 162 N. Y. 336.

54. See, *supra*, II-S, Verbal contracts.

55. See, *infra*, II-V, Mutuality.

56. *Jones v. Andreas*, 13 St. Rep. 363, 28 Week. Dig. 206.

57. *Stokes v. Stokes*, 148 N. Y. 708; *Ansgorge v. Kane*, 244 N. Y. 395;

enforce a written contract that requires a resort to parol evidence to make it definite.⁵⁸ Particularly is this true when the contract is one which by the Statute of Frauds is required to be evidenced by a writing.⁵⁹

The problem of uncertainty frequently arises in connection with verbal contracts. When it is sought to establish by word of mouth a contract which is sought to be specifically enforced in equity, the terms of the contract must be shown with certainty.⁶⁰ Moreover, such a contract must be established by satisfactory proof.⁶¹

2. Description of premises.

A contract for the conveyance of real property will not be specifically enforced unless it contains a reasonably certain description of the premises involved.⁶² This certainty is required, not merely to satisfy the requirements of a court of equity, but also to conform to the Statute of Frauds. The description need not be such as is required in a deed, for parol evidence is sometimes available to identify the particular premises under contract,⁶³ or to supply the description to be inserted in the judgment.⁶⁴ The description

Greenleaf v. Blakeman, 40 App. Div. 371, 58 N. Y. Supp. 76, affirmed without opinion, 166 N. Y. 627. "And a court of equity will not decree specific performance of a contract which is uncertain or indefinite; to authorize such relief it must be reasonably certain as to its subject-matter, its stipulations, its purposes, its parties and the circumstances under which it was made." *Hall v. Hartford*, 50 Misc. 133, 100 N. Y. Supp. 392.

58. *Mandel v. Guardian Holding Co.*, 200 App. Div. 767, 193 N. Y. Supp. 777, appeal dismissed, 234 N. Y. 533.

59. See, *supra*, II-S-4, Effect of parol evidence rule.

60. *Shakespeare v. Markham*, 72 N. Y. 400; *Crouse v. Frothingham*, 97 N. Y. 105; *Ripson v. Hart*, 64 App. Div. 593, 72 N. Y. Supp. 791; *Braun v. Ochs*, 77 App. Div. 20, 79 N. Y. Supp. 100; *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Hanly v. Hanly*, 105 App. Div. 335, 93 N. Y.

Supp. 864; *Pickett v. Michaels*, 120 App. Div. 357, 105 N. Y. Supp. 411; *Wilson v. Heath*, 23 Misc. 714, 53 N. Y. Supp. 166. And see, *supra*, II-N, Contracts for disposition of property of deceased.

61. *Dunkel v. Dunkel*, 141 N. Y. 427; *Braun v. Ochs*, 77 App. Div. 20, 79 N. Y. Supp. 100; *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Pickett v. Michaels*, 120 App. Div. 357, 105 N. Y. Supp. 411; *Racich Asbestos Mfg. Co. v. Brooks*, 146 App. Div. 14, 130 N. Y. Supp. 382; *Wilson v. Heath*, 23 Misc. 714, 53 N. Y. Supp. 166; *Phillips v. Thompson*, 1 Johns. Ch. 131.

62. *Pelletreau v. Brennan*, 113 App. Div. 806, 99 N. Y. Supp. 955.

63. *Morrison v. Brenmohl*, 137 App. Div. 4, 122 N. Y. Supp. 81; *Pelletreau v. Brennan*, 113 App. Div. 806, 99 N. Y. Supp. 955.

64. *Weintraub v. Kruse*, 195 App. Div. 807, 187 N. Y. Supp. 713; *Wein-*

is sufficiently definite if it permits the location of the premises with reasonable certainty.⁶⁵ Thus, a contract for two lots owned by the seller on a certain street between two avenues, the size of the lots being stated, was held sufficient, and parol evidence was admitted to identify the particular lots on the street which were owned by the seller.⁶⁶ So, too, a stipulation in a lease giving the lessee the privilege of purchasing the leased premises and the land of the lessor "adjoining on the east," has been thought sufficient.⁶⁷ Likewise, a description describing the premises to be conveyed as "place at Moriches, on the north side of old Country Road, being about twenty-five acres, including buildings," has been sustained as against the objection of uncertainty.⁶⁸ Similarly, a description as "forty acres of my property including woods and pond on the northwest side of my property further to be described in proper form," complies with the requirement as to certainty.⁶⁹ Moreover, the brief description of the premises as "Clinton and Joralemon Street," has been sufficiently definite.⁷⁰ A party to a contract for the exchange of two parcels of land which describes one piece as "370 feet of land on the north side of Riley Street, 300 feet east of Humboldt Parkway," and the other as "two double houses on Carmine Place, and known as 15 and 25 Carmine Place, in the city of Buffalo, N. Y.," is not justified in refusing to perform such contract upon the ground that the descriptions of the premises are too vague and uncertain to permit of their being located.⁷¹

3. Terms of mortgage or other security.

If the agreement contemplates the giving of a mortgage by the purchaser, the terms of the mortgage, especially as to duration, must be specified.⁷² In some cases, however, in

traub v. Kruse, 195 App. Div. 807, 187 N. Y. Supp. 713.

65. Van Der Bent v. Gilling, 158 App. Div. 687, 143 N. Y. Supp. 1082.

66. Waring v. Ayres, 40 N. Y. 357.

67. Heyward v. Wilmarth, 78 N. Y. Supp. 347.

68. Morrison v. Brenmohl, 137 App. Div. 4, 122 N. Y. Supp. 81.

69. Van Der Bent v. Gilling, 158 App. Div. 687, 143 N. Y. Supp. 1082.

70. Pelletreau v. Brennan, 113 App. Div. 806, 99 N. Y. Supp. 955.

71. Forsyth v. Leslie, 74 App. Div. 517, 77 N. Y. Supp. 826.

72. Gross v. Gorsch, 124 App. Div. 834, 109 N. Y. Supp. 234; Smith v. Bradhurst, 18 Misc. 546, 41 N. Y. Supp. 1002, affirmed, 31 App. Div. 98, 52 N. Y. Supp. 527; Schubach v. Konshmer, 114 Misc. 354, 186 N. Y. Supp. 400; Foot v. Webb, 59 Barb. 38; Milliman

order to accomplish equity, the courts have fixed a reasonable time for the maturity of the mortgage.⁷³ Or, the courts have thought that parol evidence could be received to determine the term of the mortgage or that it might be decreed to be paid on demand.⁷⁴

It has been held that a promise to convey premises for a specified consideration "upon the terms as specified," is not sufficient.⁷⁵ A contract for the conveyance of property as soon as the buyer "secures the payment of the same," has been thought unenforceable, as it stated neither the term of credit nor the kind or nature of security to be given.⁷⁶ Or, if the terms of the mortgage are to be agreed upon at the time of the closing of the title, the agreement is too indefinite for specific performance.⁷⁷

A failure to specify the rate of interest will not compel a court of equity to deny relief, as the court may indulge the presumption that the parties contemplated the legal rate of interest.⁷⁸

An agreement to give "satisfactory" security is too indefinite for equity.⁷⁹ But an agreement that the payment of money under a contract shall be secured either by bond of sufficient surety, individual or corporate, or by collateral security, of suitable character, has been sustained.⁸⁰

4. Time of closing title.

The memorandum of a contract need not state the date when title is to be closed.^{80a} If such detail is not expressed, the law infers that the title will be closed within a reasonable time, and the contract is enforced on that interpreta-

v. Huntington, 68 Hun 258, 22 N. Y. Supp. 997. See also, N. E. D. Holding Co. v. McKinley, 246 N. Y. 40.

73. Lawlor v. Densmore-Compton Bldg. Co., 63 Misc. 458, 118 N. Y. Supp. 463, affirmed on opinion below, 135 App. Div. 920, 120 N. Y. Supp. 1131.

74. Morrison v. Brenmohl, 137 App. Div. 4, 122 N. Y. Supp. 81; Castelli v. Burns, 156 App. Div. 200, 140 N. Y. Supp. 1057.

75. Wright v. Weeks, 3 Bosw. (16 Super. Ct.) 372, affirmed, 25 N. Y. 153.

76. Foot v. Webb, 59 Barb. 38.

77. Pollak v. Dapper, 219 App. Div. 455, 220 N. Y. Supp. 104.

78. Pollak v. Dapper, 219 App. Div. 455, 220 N. Y. Supp. 104; Schubach v. Konshmer, 114 Misc. 354, 186 N. Y. Supp. 400.

79. Ladd v. Stevenson, 43 Hun 541, 6 St. Rep. 653, affirmed, 112 N. Y. 325.

80. Greenleaf v. Blakeman, 40 App. Div. 371, 58 N. Y. Supp. 76, affirmed without opinion, 166 N. Y. 627.

80a. Tobias v. Lynch, 192 App. Div. 54, 182 N. Y. Supp. 643, affirmed, 233 N. Y. 515.

tion.⁸¹ If a contract for the exchange of properties expresses no time for the exchange to take place, either party can tender performance on reasonable notice, and can thereupon require performance from the other party.⁸²

5. Terms of lease.

A contract for a lease must be reasonably definite as to the terms of the proposed lease, or the execution of the lease cannot be compelled.⁸³ If a covenant in a lease be so ambiguous and doubtful, that it is difficult to ascertain its meaning, specific performance will not be decreed.⁸⁴ An option for the renewal of a lease, although it does not state the term of the renewal, may be construed as an option for the same term and at the same rental as the original lease.⁸⁵ But a provision in a lease that at the expiration of the term there shall be a renewal for such further time as shall prove mutually profitable, is too indefinite for judicial action.⁸⁶ An agreement to lease property may be enforced although it does not expressly fix the date of the commencement of the lease, where the subject-matter of the writing is such as to lead fairly to the inference that the lease was to take effect when the building was ready for occupancy, and that the lease itself was to be delivered within a reasonable time.⁸⁷

U. Mutuality.

1. In general.

The term "mutuality," as used in the Law of Specific Performance, attracts attention to two related, but different, questions: (1) mutuality of obligation; (2) mutuality of remedy. A contract will not be enforced in an action of specific performance unless the obligation of the contract is

81. *N. E. D. Holding Co. v. McKinley*, 246 N. Y. 40; *Tobias v. Lynch*, 192 App. Div. 54, 182 N. Y. Supp. 643, affirmed, 233 N. Y. 515.

82. *Dieter v. Fallon*, 12 N. Y. Supp. 33, 34 St. Rep. 680.

83. *Weill Co. v. Creveling*, 181 App. Div. 282, 168 N. Y. Supp. 385, affirmed, 223 N. Y. 672; *Antonville v. Bernard*, 220 App. Div. 210, 221 N. Y. Supp. 187; *Blackmore-Danzig Co. v. Silsbee*, 131 Misc. 340, 225 N. Y. Supp. 767.

84. *Buckmaster v. Thompson*, 36 N. Y. 558.

85. *Bamman v. Binzen*, 65 Hun 39, 19 N. Y. Supp. 627, 47 St. Rep. 67, affirmed on opinion below, 142 N. Y. 636. Compare, *Robinson v. Kettlelas*, 4 Edw. Ch. 67.

86. *Lloyd v. Worrell*, 37 How. Pr. 75.

87. *Ginsberg v. Oltarsh*, 130 Misc. 891, 224 N. Y. Supp. 622.

mutually binding on parties.⁸⁸ Moreover, the remedy is unavailing unless the remedy is mutual; that is, unless either party in case of default can avail himself of the remedy.⁸⁹ Thus, the rule is frequently expressed that equity will not specifically enforce a contract unless there exists both mutuality of obligation and of remedy.⁹⁰

If both parties sign an "agreement" whereby one agrees to sell certain real estate, there is deemed to be a promise by the other party to purchase it. Such an agreement is held to contain the element of mutuality.⁹¹ Or, an agreement where one agrees to purchase certain merchandise impliedly requires the other contracting party to furnish it.⁹² The mutuality of contract between the owner and an assignee of the purchaser, and the right of such assignee to enforce the contract, is discussed in another place.⁹³

2. Meeting of minds of parties.

The meeting of the minds of the parties is essential for the creation of a valid contract. It is, perhaps, unnecessary to state that this rule is applied in action of specific performance.⁹⁴ The contract must be complete.⁹⁵ In order to create a contract the minds of the parties must exactly meet in reference to every substantial term of the proposed contract. There must be a clear and unequivocal acceptance of a definite and certain offer, without material qualification or

88. *Pomeroy v. Newell*, No. 2, 117 App. Div. 800, 102 N. Y. Supp. 1098; *Woodward v. Harris*, 2 Barb. 439; *German v. Machin*, 6 Paige 288.

89. *Davis v. Epoch Producing Corp.*, 91 Misc. 631, 155 N. Y. Supp. 597.

90. *Stokes v. Stokes*, 148 N. Y. 708; *Ide v. Brown*, 173 N. Y. 26; *Wadick v. Mace*, 191 N. Y. 1; *Levin v. Dietz*, 194 N. Y. 376; *Mutual L. Ins. Co. v. Stephens*, 214 N. Y. 488; *Jones v. Barnes*, 105 App. Div. 287, 94 N. Y. Supp. 695; *Pomeroy v. Newell*, No. 2, 117 App. Div. 800, 102 N. Y. Supp. 1098; *Corney v. Pendleton*, 139 App. Div. 152, 123 N. Y. Supp. 738; *Corney v. Kline Bldg. & Constr. Co.*, 191 App. Div. 793, 182 N. Y. Supp. 15; *Schuyler v. Kirk-Brown Realty Co.*,

193 App. Div. 269, 184 N. Y. Supp. 95; *Phillips v. Berger*, 8 Barb. 527, affirming, 2 Barb. 608; *Martin v. Platt*, 5 St. Rep. 284.

91. *Corney v. Kline Bldg. & Constr. Co.*, 191 App. Div. 793, 182 N. Y. Supp. 15; *Richards v. Edick*, 17 Barb. 260.

92. *Petrolia Mfg. Co. v. Jenkins*, 29 App. Div. 403, 51 N. Y. Supp. 1028.

93. See, *infra*, III-A, Parties.

94. *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140; *Poth v. Washington Square M. E. Church*, 207 App. Div. 219, 201 N. Y. Supp. 776; *Davis v. Epoch Producing Corp.*, 91 Misc. 631, 155 N. Y. Supp. 597; *Coles v. Bowne*, 10 Paige 526; *Mayer v. McCreary*, 9 St. Rep. 114, 26 Week. Dig. 449, affirmed, 119 N. Y. 434.

variation.⁹⁶ An acceptance incorporating a term, condition or reservation not embraced within the terms of the offer, is equivalent to a rejection.⁹⁷ A counter offer is equivalent to a rejection of the original offer, so that a subsequent acceptance of the original offer, although made within the time limit specified therein, is ineffectual.⁹⁸

In order to justify an action of specific performance, there must be no doubt as to the existence of a contract. It must have been concluded and not be merely in the process of negotiation, and none of the terms must have been left to be settled by future negotiations. If it is doubtful whether an agreement has been concluded, specific performance will not be granted.⁹⁹ If the minds of the parties have not met

95. *Kayser v. Arnold*, 124 N. Y. 674; *Mechanics' Nat. Bank v. Jones*, 76 App. Div. 534, 78 N. Y. Supp. 800, affirmed without opinion, 175 N. Y. 518; *Mandel v. Guardian Holding Co.*, 200 App. Div. 767, 193 N. Y. Supp. 777, appeal dismissed, 234 N. Y. 533; *Birnbaum v. Stein*, 112 Misc. 240, 184 N. Y. Supp. 50; *Patrick v. Kleine*, 127 Misc. 38, 215 N. Y. Supp. 305; *Milliman v. Huntington*, 68 Hun 258, 22 N. Y. Supp. 997, 52 St. Rep. 273; *Bonnet v. Babbage*, 19 N. Y. Supp. 934.

Blanks in contracts.—Blank spaces in a contract relating to material provisions, may preclude a specific performance of the contract. *Kayser v. Arnold*, 124 N. Y. 674. In some cases, however, they may be disregarded. *N. E. D. Holding Co. v. McKinley*, 246 N. Y. 40.

96. *Stanley v. Gannon*, 109 Misc. 611, 180 N. Y. Supp. 602.

97. *Stanley v. Gannon*, 109 Misc. 611, 180 N. Y. Supp. 602.

98. *Vogt v. Longfellow*, 123 App. Div. 498, 205 N. Y. Supp. 719. "There are abundant authorities to the effect that a counter offer amounts to a rejection of an offer, but in nearly all of the cases there was no time limit set for acceptance. In such cases the acceptance must be made within a

reasonable time, depending upon the circumstances, and when a counter offer is made, it amounts to a rejection and thereafter an acceptance is of no avail. There is no reason why the same rule should not apply to a case where a time limit is prescribed by an offer. There is no distinction to be drawn where the offer must be accepted within a reasonable time and where it must be accepted within a definitely stated time. In either case the offeree cannot make a counter offer without destroying his right thereafter to accept, unconditionally, the original offer. The counter offer conveys the impression that the offer is not satisfactory and that the offeree desires to open negotiations on a counter proposition. There is nothing to prevent the offeree from making inquiries or requests, but when he goes beyond inquiry and request and makes a modified offer, which if accepted constitutes a contract, he has shut the door to a subsequent acceptance of the original offer." *Vogt v. Longfellow*, 123 App. Div. 498, 205 N. Y. Supp. 719.

99. *Mayer v. McCreary*, 119 N. Y. 434; *N. E. D. Holding Co. v. McKinley*, 246 N. Y. 40; *Keystone Hardware Co. v. Tague*, 246 N. Y. 79; *Ansgorge v. Kane*, 244 N. Y. 395; *Kingsbridge*

as to the location and boundaries of the property to be conveyed, there is no contract which can be specifically enforced.¹ If the negotiations contemplate a future agreement as to plans for the alteration of buildings, the minds of the parties have not met.²

On the other hand, if the agreement is complete the fact that it is informal and contemplates the execution of a more formal agreement, does not render it ineffective. The original memorandum of contract may be enforced as a consummated agreement, although the formal agreement is never concluded.³ An informal receipt may be sufficient if it contains all the necessary elements of a contract.⁴ Letters or telegrams may also, in some cases, be sufficient to establish a contract.⁵

3. Mutuality of remedy.

It has been very generally announced, as a rule peculiar to an action of specific performance, that the remedy is not available to a party, unless the remedy is mutual.⁶ That is

Imp. Co. v. American E. P. Nat. Bank, 249 N. Y. 97; *Mandel v. Guardian Holding Co.*, 200 App. Div. 767, 193 N. Y. Supp. 777, appeal dismissed, 234 N. Y. 533; *Belbird Realty Corp. v. Wolfson*, 221 App. Div. 67, 222 N. Y. Supp. 659; *Davis v. Epoch Producing Corp.*, 91 Misc. 631, 155 N. Y. Supp. 597; *Birnbaum v. Stein*, 112 Misc. 240, 184 N. Y. Supp. 50; *Eisenberg v. Spachman*, 117 Misc. 109, 190 N. Y. Supp. 662, modified, 203 App. Div. 875, 196 N. Y. Supp. 924; *Quale v. McDaniels*, 127 Misc. 571, 217 N. Y. Supp. 22; *Savage v. Weigel*, 128 Misc. 618, 219 N. Y. Supp. 99; *Blackmore-Danzig Co. v. Silsbee*, 131 Misc. 340, 225 N. Y. Supp. 767; *Koppe v. Gallagher*, 133 Misc. 79, 230 N. Y. Supp. 680; *Milliman v. Huntington*, 68 Hun 258, 22 N. Y. Supp. 997, 52 St. Rep. 273.

Employment.—An agreement to enter the employment of a plaintiff, for a period to be mutually agreed upon between the parties, remains indefinite if the term is never fixed, and such an agreement cannot be specifically

enforced. *Clark Paper & Mfg. Co. v. Stenacher*, 236 N. Y. 312.

1. *Wadick v. Mace*, 191 N. Y. 1.

2. *Mayer v. McCreery*, 119 N. Y. 434.

3. *Boysen v. Van Dorn Iron Works*, 94 App. Div. 95, 87 N. Y. Supp. 995; *Pelletreau v. Brennan*, 113 App. Div. 806, 99 N. Y. Supp. 955; *Pollak v. Dapper*, 219 App. Div. 455, 220 N. Y. Supp. 104; *Eisenberg v. Spachman*, 117 Misc. 109, 190 N. Y. Supp. 662, modified, 203 App. Div. 875, 196 N. Y. Supp. 924.

4. *Lukawski v. Devlin*, 243 N. Y. 583. See also, *Belbird Realty Corp. v. Wolfson*, 221 App. Div. 67, 222 N. Y. Supp. 659.

5. *No. 2 & 4 Roman Ave., Inc. v. Goddard*, 220 App. Div. 138, 221 N. Y. Supp. 284. See also, *Blackmore-Danzig Co. v. Silsbee*, 131 Misc. 340, 225 N. Y. Supp. 767.

6. *Palmer v. Gould*, 144 N. Y. 671; *Stokes v. Stokes*, 148 N. Y. 708; *Ide v. Brown*, 178 N. Y. 26; *Wadick v. Mace*, 191 N. Y. 1; *Corney v. Kline Bldg. & Constr. Co.*, 191 App. Div.

to say, a plaintiff cannot resort to the remedy, unless the contract is such that, in case of a default by the plaintiff, the defendant could have sought relief in the same form of action.⁷ Thus, if a contract for the sale of real property expressly states that the vendor shall have no remedy by way of specific performance, the buyer likewise is precluded from maintaining the action.⁸ Contracts for services may be of such a personal nature, that specific performance of the services cannot be required; and hence the party contracting to furnish the services cannot compel the other party to specifically perform the agreement.⁹

In the last few years, however, the "mutuality" rule has been badly shaken; and it has been said, "If there ever was a rule that mutuality of remedy existing, not merely at the time of the decree, but at the time of the formation of the contract, is a condition to equitable relief, it has been so qualified by exceptions that, viewed as a precept of general validity, it has ceased to be a rule to-day. * * * What equity exacts to-day as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant. * * * Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end. The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle."¹⁰

Full performance by the complaining party may relieve him against the objection that originally the contract was not mutual in remedy.¹¹ This result is sometimes reached where one has agreed to make a testamentary provision in compensation of services rendered or other acts performed.¹²

793, 182 N. Y. Supp. 15; Schuyler v. Kirk-Brown Realty Co., 193 App. Div. 269, 184 N. Y. Supp. 95; Boehly v. Mansing, 52 Misc. 382, 102 N. Y. Supp. 171; Benedict v. Lynch, 1 Johns. Ch. 370.

7. *Ide v. Brown*, 178 N. Y. 26; *Wadick v. Mace*, 191 N. Y. 1; *Levin v. Dietz*, 194 N. Y. 376; *Lee v. Lloyd*, 111 Misc. 405, 181 N. Y. Supp. 295; *Martin v. Platt*, 5 St. Rep. 284.

8. *Wadick v. Mace*, 191 N. Y. 1.

9. *Martin v. Platt*, 5 St. Rep. 284.

10. *Epstein v. Gluckin*, 233 N. Y. 490.

11. *Q. R. S. Co. v. Philipps-Jones Corp.*, 194 App. Div. 170, 185 N. Y. Supp. 127, affirmed, 233 N. Y. 626.

12. *Phalen v. United States Trust Co.*, 186 N. Y. 178. See also, *Pattat v. Pattat*, 93 App. Div. 102, 87 N. Y. Supp. 140. See, *supra*, II-N, Contracts for disposition of property of deceased.

4. Unilateral contracts.

In case of a contract which is purely unilateral, that is, binding upon but one of the parties, there is an absence of mutuality of obligation as well as of remedy, and the contract will not be enforced in an action of specific performance.¹³ In equity one not bound by a contract cannot call upon the other party to perform the contract.¹⁴ A party not bound by the agreement itself has no right to call upon a court of equity to enforce specific performance against the other contracting party by expressing his willingness in his plea to perform his part of the agreement. His right to the aid of the court does not depend upon his subsequent offer to perform the contract upon his part, but upon its original obligating character.¹⁵ This does not mean that a contract is unenforceable merely because only one of the parties has signed it. If the party not signing has in fact accepted the

13. *Levin v. Deitz*, 194 N. Y. 376; *Topken, Loring & Schwartz, Inc. v. Schwartz*, 249 N. Y. 206; *Dittenfass v. Horsley*, 177 App. Div. 143, 163 N. Y. Supp. 626; *Palmer v. Rotary Realty Co.*, 178 App. Div. 907, 164 N. Y. Supp. 1104; *Colt v. O'Connor*, 59 Misc. 83, 109 N. Y. Supp. 689.

14. *Mutual L. Ins. Co. v. Stephens*, 214 N. Y. 438; *Kohart v. Boyle*, 140 App. Div. 856, 125 N. Y. Supp. 567; *Dittenfass v. Horsley*, 177 App. Div. 143, 163 N. Y. Supp. 626; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Greinel v. O'Connor*, 118 N. Y. Supp. 1053.

A vendee of lands who refused to execute the contract of sale tendered by the vendor unless the term of a mortgage on the premises was extended cannot maintain an action for the specific performance of the contract, for it lacked mutuality. One cannot enforce a contract not binding upon himself. *Kohart v. Boyle*, 140 App. Div. 856, 125 N. Y. Supp. 567.

Subject to approval of corporation.—A vendor corporation may have a land contract entered into by its officers, subject to consent of the stockholders required by section 20 of the Stock Corporation Law, specifically

enforced after said consents are obtained, notwithstanding a provision in the contract that if the vendor is unable to deliver a deed conveying good and marketable title or is unable to obtain the consent of the stockholders, the vendee shall be entitled to the return of any payments made together with reasonable expenses for the examination of title. The fact that the contract relieves the vendor from the obligation to perform specifically does not defeat its right to compel the vendee to perform the contract. A contract executed by the officers of a corporation for the sale of real property of the corporation, subject to consents by the stockholders, as required by section 20 of the Stock Corporation Law, is not a sale of the land, and it is not necessary that the stockholders consent to the sale before the contract is executed, but a contract so executed which is subsequently consented to by the required number of stockholders is valid and enforceable. *Neponsit Holding Corp. v. Ansorge*, 215 App. Div. 371, 214 N. Y. Supp. 91.

15. *Colt v. O'Connor*, 59 Misc. 83, 109 N. Y. Supp. 689.

contract and acted upon it, both parties are bound.¹⁶ One accepting a deed containing obligations to be performed by him may, in a proper case, be compelled to perform such obligations.¹⁷

5. Options.

An option for the purchase or lease of premises, standing alone, is but a unilateral contract, which cannot be enforced against either the proposed seller or the proposed purchaser.¹⁸ But, when the option is accepted by the optionee, it may become a contract binding on both parties, and either may resort to an action of specific performance.¹⁹ An option for the renewal of a lease is governed by the same principles.²⁰

If the time for the exercise of the option is stated therein, it is deemed of the essence of the option,²¹ and a tardy acceptance fails to make a binding contract.²² But, if the holder of an option is induced to postpone a tender by assurances of the owner that the option would be kept alive, the

16. *Worrall v. Munn*, 5 N. Y. 229; *Newburger v. American Surety Co.*, 242 N. Y. 134; *Van Name v. Queens Land, etc., Co.*, 130 App. Div. 857, 115 N. Y. Supp. 905; *Boehly v. Mansing*, 52 Misc. 382, 102 N. Y. Supp. 171; *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300, 31 How. Pr. 38; *Woodward v. Aspinwall*, 3 Sandf. (5 Super. Ct.) 272. See also, *Mason v. Decker*, 72 N. Y. 595.

17. *Post v. West Shore R. Co.*, 173 N. Y. 580; *Aikin v. Albany, etc., R. Co.*, 26 Barb. 289.

18. *Lewis v. Pollinger*, 115 Misc. 221, 187 N. Y. Supp. 563.

19. *Hamilton College v. Roberts*, 223 N. Y. 56; *Jones v. Barnes*, 105 App. Div. 287, 94 N. Y. Supp. 695; *Pflum v. Spencer*, 123 App. Div. 742, 108 N. Y. Supp. 344; *Carney v. Pendleton*, 139 App. Div. 152, 123 N. Y. Supp. 738; *Stewart v. Gillett*, 79 Misc. 93, 139 N. Y. Supp. 583; *Lewis v. Bollinger*, 115 Misc. 221, 187 N. Y. Supp. 563; *Leonard v. Schnarir*, 119 Misc. 200, 196 N. Y. Supp. 173; *Matter of*

Johnson v. Board of Supervisors, 121 Misc. 315, 201 N. Y. Supp. 50, modified on other grounds, 207 App. Div. 838, 201 N. Y. Supp. 912; *Diamond v. Talobott*, 123 Misc. 339, 205 N. Y. Supp. 309; *Lazarus v. Heilman*, 11 Abb. N. C. 93, 2 Civ. Proc. (Browne) 204; *Matter of Hunter*, 1 Edw. Ch. 1; *Codding v. Wamsley*, 1 Hun 585, 4 T. & C. 49, affirmed, 60 N. Y. 644; *Pettivone v. Moore*, 75 Hun 461, 27 N. Y. Supp. 455.

20. **Relief unnecessary.**—Where a lease in writing gives a tenant the option to renew the lease for the same term of years, the tenant may renew the lease for the additional term, and hence cannot maintain an action for the specific performance of the renewal agreement. *Maisal v. Shammholt*, 189 App. Div. 831, 179 N. Y. Supp. 292.

21. *Codding v. Wamsley*, 1 Hun 585, 4 T. & C. 49, affirmed, 60 N. Y. 644.

22. *Noble v. Higgins*, 214 App. Div. 135, 211 N. Y. Supp. 833.

owner is estopped from terminating the contract without reasonable notice that would put the buyer in default.²³

Acts as well as words may constitute an acceptance of an option.²⁴ Taking possession of the premises may constitute an acceptance of the option.²⁵ Or, if the optionee was temporarily in possession of the premises when the option was given, the making of permanent improvements may evidence an acceptance.²⁶ An option for the sale of real property, if signed by the owner and containing all the elements required to conform to the Statute of Frauds, may be accepted by word of mouth.²⁷ But an intention to accept the option not conveyed to the owner in any manner, is insufficient to make a binding agreement.²⁸

An agreement in a lease that upon the acceptance of option therein the price shall be determined by appraisals, may be specifically enforced; but an agreement for an appraisal in advance of acceptance of the option, apparently desired to enable the lessee to ascertain whether acceptance is desirable, will not be enforced by specific performance.²⁹

An option is not a contract; it is a mere offer. If not based on a consideration, it may be withdrawn at any time before acceptance.³⁰ A sale to a third party before the acceptance of the option constitutes a withdrawal.³¹

An option based on a good consideration is more than a mere offer. It is a contract which cannot be revoked by the owner during the period the holder of the option is allowed to decide whether to exercise the privilege.³² Thus, if the option is contained in a lease, the lease itself with the rentals to be paid furnishes an adequate consideration for the

23. *Holden v. Efficient Craftsman Corp.*, 234 N. Y. 437.

24. *Pettibone v. Moore*, 75 Hun 461, 27 N. Y. Supp. 455.

25. *Matter of Johnson v. Board of Supervisors*, 121 Misc. 315, 201 N. Y. Supp. 50, modified on other grounds, 207 App. Div. 888, 201 N. Y. Supp. 912.

26. *Spitzle v. Gath*, 112 Misc. 630, 183 N. Y. Supp. 743.

27. *Pettibone v. Moore*, 75 Hun 461, 27 N. Y. Supp. 455.

28. *Noble v. Higgins*, 214 App. Div. 135, 211 N. Y. Supp. 833.

29. *Mutual L. Ins. Co. v. Stephens*, 214 N. Y. 488.

30. *Stewart v. Gillett*, 79 Misc. 93, 139 N. Y. Supp. 583; *Schulman, etc., Corp. v. Katz*, 126 Misc. 777, 215 N. Y. Supp. 549; *Pettibone v. Moore*, 75 Hun 461, 27 N. Y. Supp. 455.

One Dollar.—An option not under sale is not irrevocable, because it recites a consideration of one dollar. *Schulman, etc., Corp. v. Katz*, 126 Misc. 777, 215 N. Y. Supp. 549.

31. *Pomeroy v. Newell*, No. 2, 117 App. Div. 800, 102 N. Y. Supp. 1098.

32. *Spitzle v. Gath*, 112 Misc. 630, 183 N. Y. Supp. 743.

option.³³ In such a case, it cannot be withdrawn by the landlord, but remains binding until the time for its acceptance has expired or the tenant has refused to exercise it.³⁴ In a proper case an agreement to sell may be enforced against a purchaser from the landlord.³⁵ It is not binding after the termination of the lease, although the tenant remains in possession of the premises.³⁶

6. Fraud.

A party induced to execute a contract through fraud, may decline to be bound thereby. The existence of fraud may be a ground for the rescission of the contract so that it is unenforceable, either in law or in equity. Moreover, the taking of an unfair advantage, although it is not treated as a positive fraud, may render the contract so inequitable that the courts, in the exercise of the discretion committed to them, will refuse to grant specific performance, thus leaving the parties to their remedy at law to test the validity of the contract.³⁷ One who has been induced by fraud or misrepresentation to enter into a contract may, after the discovery of the fraud and with full knowledge of the facts, affirm the contract and waive the fraud.³⁸ Thereafter, either

33. *Sargent v. Vought*, 194 App. Div. 807, 185 N. Y. Supp. 578; *Crocker v. Page*, 210 App. Div. 735, 206 N. Y. Supp. 481, affirmed, 240 N. Y. 638; *Lewis v. Follinger*, 115 Misc. 221, 187 N. Y. Supp. 563; *Matter of Hunter*, 1 Edw. Ch. 1.

Conditional option.—If a lease provides that, if at any time the lessor decides to sell the premises, the lessees shall have the preference at such sale, the specific performance of the option to purchase may not be decreed, in the absence of proof that the lessor ever decided or had tried or offered to sell the premises. *Lewis v. Ludlum*, 115 Misc. 347, 189 N. Y. Supp. 636, affirmed, 204 App. Div. 889, 197 N. Y. Supp. 926. A covenant in a lease that the landlord, in case he shall desire to sell the premises before the expiration of the lease, shall give the tenant the first option to purchase, obligates the landlord, if he wishes to

sell to another person during the term, to offer the property to the tenant on the same terms as offered to the landlord by any third person. *Jorgeson v. Morris*, 194 App. Div. 92, 185 N. Y. Supp. 386.

34. *Carney v. Pendleton*, 139 App. Div. 152, 123 N. Y. Supp. 738; *Walker v. Bradley*, 89 Misc. 516, 153 N. Y. Supp. 686. See also, *Kotcher v. Edelblute*, 223 App. Div. 451, 228 N. Y. Supp. 455.

35. *Carney v. Pendleton*, 139 App. Div. 152, 123 N. Y. Supp. 738; *Mandel v. Guardian Holding Co., Inc.*, 195 App. Div. 576, 187 N. Y. Supp. 4; *Lazarus v. Heilman*, 11 Abb. N. C. 93, 2 Civ. Proc. (Browne) 204.

36. *Friederang v. Ruth Aldo Co.*, 199 App. Div. 127, 191 N. Y. Supp. 401.

37. See, *infra*, II-W-3, Mistake, fraud, accident, surprise.

38. *Balheimer v. Reichardt*, 55 How. Pr. 414.

party may be in a position to seek specific performance of the contract.³⁹

The employment of puffers by a vendor at a sale by auction absolves the purchaser from the obligation of his contract of purchase.⁴⁰

7. Want of consideration.

An executory contract made without consideration is not enforceable, either at law or in equity.⁴¹ Relief may be denied where the consideration has failed,⁴² as where the plaintiff has failed to perform the agreements to be performed by him.⁴³ Moreover, courts of equity will not enforce a contract where the consideration is so inadequate as to shock the conscience of the court.⁴⁴

A promise of a gift, when acted upon by the prospective donee to his prejudice, may ripen into a contract which will be enforceable in equity.⁴⁵ This situation sometimes arises when one promises to give a parcel of land to a child or other near relative, and in reliance on the gift substantial repairs are made to the premises.⁴⁶

A seal on an instrument raises a presumption of consideration, which presumption, however, under section 342 of the Civil Practice Act, may be rebutted. If, however, a contract under seal states a consideration, parol evidence is inadmissible to contradict the written instrument and show that no consideration passed.⁴⁷

A recital of a consideration of one dollar and other good and valuable considerations is sufficient to sustain the con-

39. *Balheimer v. Reichardt*, 55 How. Pr. 414.

40. *Bowann v. McClenahan*, 19 Misc. 438, 44 N. Y. Supp. 482, affirmed, 20 App. Div. 346, 46 N. Y. Supp. 945.

41. *Geer v. Clark*, 83 App. Div. 292, 92 N. Y. Supp. 87; *Woodcock v. Bennett*, 1 Cow. 711; *Hermann v. Passmore*, 72 Hun 526, 25 N. Y. Supp. 773; *Acker v. Phoenix*, 4 Paige, 305.

The withdrawal of legal proceedings, undertaken for the purpose of asserting claims to property, and procuring releases from the claimants, are sufficient consideration to support an

agreement for a division of such property. *Downer v. Church*, 44 N. Y. 647.

42. *Stokes v. Stokes*, 148 N. Y. 708.

43. *Moers v. Moers*, 187 App. Div. 653, 176 N. Y. Supp. 277; *Burling v. King*, 66 Barb. 633.

44. See, *infra*, II-W-4, Inadequate consideration.

45. *Phalen v. United States Trust Co.*, 186 N. Y. 178; *Sarasohn v. Kamaiky*, 193 N. Y. 203.

46. See, *supra*, II-S-5-11, Part performance.

47. *Fuller v. Artman*, 69 Hun 546, 24 N. Y. Supp. 13, 53 St. Rep. 339.

tract, at least, in the absence of evidence that in fact no consideration was given.⁴⁸

8. Contract cancelled.

Competent parties who have entered into a contract have undoubted power by a subsequent arrangement to cancel their contract.⁴⁹ This situation may arise where the parties made a subsequent contract, which does not rescind the former agreement, but nevertheless covers the entire subject of the former.⁵⁰ Where, after a default in a contract for the purchase of premises, a new agreement is made and left in escrow, the second contract, although conditional, constitutes a rescission of the former contract; and, if the condition is not performed, neither contract can be enforced.⁵¹ If the purchaser, upon finding the title to be defective, demands the return of the interest paid at the execution of the contract, he is deemed to have rescinded the contract, and he or his assignee has no further remedy except to recover such money.⁵² If the evidence as to cancellation is conflicting, appellate courts are loath to interfere with the determination below.⁵³

A cancellation of a contract may, for sufficient cause, be rescinded, so as not to preclude the specific performance of the original contract.⁵⁴

V. Impossibility of performance.

1. In general.

Whatever remedies an aggrieved party may have by way of damages or otherwise, it is clear that, if it is impossible for his opponent to perform his contractual obligations, equity will not vainly make a decree directing performance.⁵⁵

48. *Matter of Steglich*, 91 App. Div. 75, 86 N. Y. Supp. 257.

49. *Airnoux v. Homans*, 25 How. Pr. 427; *Aldrich v. Putney*, 11 Paige 204.

50. *Davison v. Jersey Co.*, 71 N. Y. 333.

51. *Price v. McGown*, 10 N. Y. 465.

52. *Monds v. Bircheld*, 59 Misc. 287, 112 N. Y. Supp. 249.

53. *Arnoux v. Homans*, 25 How. Pr. 427.

54. *Melzer v. Karanas*, 220 App. Div. 240, 221 N. Y. Supp. 71.

55. *Barlow v. Scott*, 24 N. Y. 40; *O'Beirne v. Allegheny & Kinzna R. Co.*, 151 N. Y. 372; *Saperstein v. Mechanics & Farmers Sav. Bank*, 228 N. Y. 257; *Levy v. Knepper*, 117 App. Div. 163, 102 N. Y. Supp. 313; *Beattie v. Burt*, 122 App. Div. 473, 107 N. Y. Supp. 153; *Pratt v. Clark*, 49 Misc. 146, 98 N. Y. Supp. 700, affirmed, 118 App. Div. 633, 103 N. Y. Supp. 612, appeal dismissed, 196 N. Y. 502; *Messenger v. Chambers*, 53 Misc. 117, 103 N. Y. Supp. 1100; *Davis v. Epoch*

In other words impossibility of performance is a good defense to an action of specific performance. With especial force is this rule applicable when the plaintiff, at the time of the commencement of the action, had full knowledge of the situation and that performance was impossible.⁵⁶ If specific performance would result in a violation of law, it should not be directed.⁵⁷

2. Defendant unable to furnish marketable title.

If the vendor of real property is unable to furnish a marketable title, equity will not compel him to do so.⁵⁸ Relief may be granted to purchaser by way of damages, or otherwise,⁵⁹ or the vendor may be required to convey such title as he may have,⁶⁰ with an abatement, in some cases, on the purchase price,⁶¹ but he will not be required to furnish the good and sufficient warranty deed which he promised.

A lien on the premises which the vendor is unable to discharge may prohibit the granting of specific performance.⁶² The same result is reached when the building on the prem-

Producing Corp., 91 Misc. 631, 155 N. Y. Supp. 597; *Glasser v. Loughran*, 103 Misc. 20, 170 N. Y. Supp. 190; *Sabriski v. Veloski*, 25 Abb. N. C. 185, 11 N. Y. Supp. 668; *Stevenson v. Buxton*, 15 Abb. Pr. 352, 37 Barb. 13, reversing, 8 Abb. Pr. 414; *Woodward v. Harris*, 2 Barb. 439; *Martin v. Colby*, 42 Hun 1, 3 St. Rep. 415, 25 Week. Dig. 358; *Wilbur v. Gold & Stock Teleg. Co.*, 20 Jones & S. (52 Super. Ct.) 189; *Mehl v. Von Der Wulbeke*, 2 Lans. 267, reversed on other grounds 46 N. Y. 539; *Morse v. Elmendorf*, 11 Paige 277.

56. *Ellis v. Salomon*, 57 App. Div. 118, 67 N. Y. Supp. 1025.

57. *Palombi v. Volpe*, 249 N. Y. 194.

58. *Saperstein v. Mechanics & Farmers Sav. Bank*, 228 N. Y. 257; *Levy v. Hill*, 50 App. Div. 294, 63 N. Y. Supp. 1002, affirmed without opinion, 174 N. Y. 536; *Snow v. Monk*, 81 App. Div. 206, 80 N. Y. Supp. 719; *Stuyvesant v. Weil*, 26 Misc. 445, 57 N. Y. Supp. 592; *Messenger v. Chambers*, 53 Misc. 117, 103 N. Y. Supp. 1100;

Blasser v. Loughran, 103 Misc. 20, 170 N. Y. Supp. 190; *Grosso v. Sporer*, 123 Misc. 796, 206 N. Y. Supp. 227; *Stevenson v. Buxton*, 15 Abb. Pr. 352, 37 Barb. 13, reversing, 8 Abb. Pr. 414; *Seymour v. De Lancey*, Hopk. Ch. 436, affirmed, 5 Cow. 714; *Hock v. Cocks*, 78 Hun 253, 28 N. Y. Supp. 952, 60 St. Rep. 229; *Rohde v. Helselden*, 134 N. Y. Supp. 103; *Morse v. Elmendorf*, 11 Paige 277; *Eickwort v. Powers*, 43 St. Rep. 328, 17 N. Y. Supp. 137.

59. See, *infra*, IV, Relief granted.

60. *Jones v. Barnes*, 105 App. Div. 287, 94 N. Y. Supp. 695; *Jandorf v. Smith*, 217 App. Div. 150, 217 N. Y. Supp. 145; *Liebman v. Hall*, 110 Misc. 365, 180 N. Y. Supp. 514; *Westervelt v. Matheson*, Hoff. Ch. 36.

61. See, *infra*, IV-G, Abatement of purchase price.

62. *Donath v. Germania Land Co.*, 25 Misc. 641, 56 N. Y. Supp. 313; *Glasser v. Loughran*, 103 Misc. 20, 170 N. Y. Supp. 190; *Schwimmer v. Roth*, 111 Misc. 654, 182 N. Y. Supp. 12.

ises encroaches on the adjoining lands.⁶³ If the wife of the vendor did not sign the contract and refuses to join in her husband's deed, strict performance of the contract will not be enforced,⁶⁴ especially if she is not a party to the action.⁶⁵ The rights of the purchaser in such a case, however, are protected by allowing him to elect as to one of several remedies.⁶⁶ If the purchaser is willing to take the title subject to the inchoate right of dower of the seller's wife, her refusal to sign the deed does not prevent a decree in specific performance.⁶⁷

3. Conveyance of property to third person.

By a conveyance of the property to a third person after the making of the contract, a person may place it beyond his power specifically to perform his obligations; and a court of equity will not require him to do so.⁶⁸ A contract of sale made with an innocent third person may have much the same effect as an executed transfer.⁶⁹ If, however, such third person is chargeable with notice, either actual or constructive, of the contracts, and is made a party to the action, he may be required to perform the contract.⁷⁰ If the purchaser was in default, the seller may be within his rights in making the conveyance, and the seller may be without remedy in any form.⁷¹

4. Performance conditioned on act of third person.

Inability to perform a contract may arise when the contract contemplates action by some third person, and such

63. *Snow v. Monk*, 81 App. Div. 206, 80 N. Y. Supp. 719.

64. *Sternberger v. McGovern*, 56 N. Y. 12; *Feldman v. Lisansky*, 239 N. Y. 81; *Roos v. Lockwood*, 59 Hun 181, 13 N. Y. Supp. 128, 37 St. Rep. 182; *Bonnet v. Baggage*, 19 N. Y. Supp. 934.

65. *Schoer v. Gervicz*, 39 Misc. 186, 79 N. Y. Supp. 134; *Giannini v. Foster*, 119 Misc. 343, 196 N. Y. Supp. 247.

66. See, *infra*, IV-K, Vendor's wife refusing to sign deed.

67. *Jones v. Barnes*, 105 App. Div. 287, 94 N. Y. Supp. 695.

68. *Reynolds v. Condon*, 110 App.

Div. 542, 97 N. Y. Supp. 1; *Barnett v. Sussman*, 116 App. Div. 859, 102 N. Y. Supp. 287; *Lasher v. McDermott*, 144 App. Div. 843, 129 N. Y. Supp. 416, affirmed without opinion, 205 N. Y. 558; *Jurgesen v. Morris*, 194 App. Div. 92, 185 N. Y. Supp. 386; *Giannini v. Foster*, 119 Misc. 343, 196 N. Y. Supp. 247; *Woodward v. Harris*, 2 Barb. 439; *Hatch v. Cobb*, 4 Johns. Ch. 559; *Doll v. Ingram*, 26 Week. Dig. 565, 8 St. Rep. 253.

69. *Saperstein v. Mechanics & Farmers Sav. Bank*, 228 N. Y. 257.

70. See, *infra*, III-A-6, Grantee.

71. *Hatch v. Cobb*, 4 Johns. Ch. 559.

third person does not perform the act anticipated. Under such circumstances specific performance will be denied, not only because of the impossibility of performance, but also in some cases because literal performance would be unjust and inequitable.⁷² Where a defendant agreed to transfer to the plaintiff stock in a corporation he was seeking to organize, but failed to obtain capital for that purpose, the plaintiff could not specifically enforce the agreement as to stock in a similar corporation organized by another person, although the defendant was interested in such corporation.⁷³

5. Contract partly performable.

It is the general rule that if performance of the contract is possible in part and impossible in part, equity will not enforce any part.⁷⁴ If the part of which performance is possible materially affects the other part or is inseparable therefrom, specific performance will not be decreed.⁷⁵ But, if the part capable of performance can be separated from the other parts of the contract without doing an injustice, equity may intervene.⁷⁶ Or, if the vendor of property is unable to make a complete performance, the vendee is allowed the option of accepting such title as the vendor can deliver, the vendee, in some cases, being allowed an abatement on the purchase price.⁷⁷

Where one agreed to sell certain stock to the plaintiff and to procure a third person to advance a certain sum of money as a building loan, and it appears that the third person refused to make the loan, there can be no decree of specific performance on the agreement to sell the stock.⁷⁸

6. Performance possible at time of trial.

The fact that at the time the contract in question was made, the defendant was unable to perform his obligations

72. *Pratt v. Clark*, 49 Misc. 146, 98 N. Y. Supp. 700, affirmed, 118 App. Div. 633, 103 N. Y. Supp. 612, appeal dismissed, 196 N. Y. 502.

73. *Sessions v. Elwell*, 54 St. Rep. 363, 24 N. Y. Supp. 599.

74. *Waters v. Travis*, 9 Johns. 450; *Talbot v. Adams*, 12 Week. Dig. 410.

75. *Palombi v. Volpe*, 249 N. Y. 194; *Meyer v. Kauffmann*, 105 Misc. 512, 173 N. Y. Supp. 601.

76. *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun 467.

77. *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun 467; *Waters v. Travis*, 9 Johns. 450; *Morse v. Elmendorf*, 11 Paige 277; *Allerton v. Johnson*, 3 Sandf. Ch. 72. See also *Sternberger v. McGovern*, 56 N. Y. 12. See, *infra*, IV-G, Abatement of purchase price.

78. *Doctor v. Reiss*, 180 App. Div. 62, 167 N. Y. Supp. 193.

does not bar relief by way of specific performance, provided performance is possible at the time of the trial.⁷⁹ Similarly, a plaintiff, unable to perform at the time of the execution of the contract, may have relief in specific performance if he is able to convey a good title at the time of the trial.⁸⁰ If objections to the title are cured before the determination of the issues, a party may be required specifically to perform his contract.⁸¹ The complaint will not be dismissed, nor will the issues be sent to the jury calendar merely because the pleadings indicate an impossibility of performance, provided the difficulty is one which may be cured before trial.⁸² But, when one agrees to convey by a quit-claim deed, the agreement is deemed to refer to the title the seller had at the time of the agreement, not such as he may subsequently acquire.⁸³

7. How question raised.

The impossibility of performance, if it is to be offered as a defense to the action, should be set up in the answer, so that a full inquiry may be had on that question.⁸⁴ This, however, does not seem to be a strict requirement, for regardless of the pleadings, a court of equity will refuse to be placed in the position of making a futile decree. But, in the absence of some proof or admission indicating the impossibility, the court will assume that performance is pos-

79. *Haffey v. Lynch*, 143 N. Y. 241; *Kahn v. Chapin*, 152 N. Y. 305; *Pierce v. Nichols*, 1 Paige 244; *Allerton v. Johnson*, 3 Sandf. Ch. 72. "Equity courts, in awarding relief, generally look at the conditions existing at the close of the trial of the action and adapt their relief to those conditions. The plaintiff, in an equity action, as a general rule, should not be turned out of court on account of any defense interposed to his action, if at the time of the trial the facts are such, that, if he then commenced his action, he would be entitled to the equitable relief sought." *Haffey v. Lynch*, 143 N. Y. 241.

80. See, *infra*, II-Y-9-n, Title marketable at time of trial.

81. *Haffey v. Lynch*, 143 N. Y. 241;

Rosenberg v. Haggerty, 189 N. Y. 481; *Krasnow v. Tupp*, 128 App. Div. 156, 112 N. Y. Supp. 546; *Pierce v. Nichols*, 1 Paige 244; *Stevenson v. Spratt*, 3 Jones & S. (35 Super. Ct.) 496.

82. *Krasnow v. Topp*, 128 App. Div. 156, 112 N. Y. Supp. 546.

83. *Woodcock v. Bennet*, 1 Cow. 711.

84. *Clextion v. Tunnard*, 119 App. Div. 709, 104 N. Y. Supp. 665; *Stuyvesant v. Weil*, 26 Misc. 445, 57 N. Y. Supp. 592.

A supplemental answer may be allowed, where the inability to perform arose after the commencement of the action. *Wilbur v. Gold & Stock Teleg. Co.*, 20 Jones & S. (52 Super. Ct.) 189.

sible and will make a decree accordingly.⁸⁵ If the question was not raised in the court below, the Appellate Division will not ordinarily reverse the judgment on that ground.⁸⁶ If there is any question as to the ability of the defendant to perform, the question should be raised in the action. The defendant cannot reserve the question until the plaintiff seeks to enforce the decree.⁸⁷

W. Discretion of court.

1. In general.

Remedy by way of an action of specific performance is said to be discretionary.⁸⁸ The right to the specific performance of a contract rests in judicial discretion, and may

85. *Maas v. Morgenthaler*, 136 App. Div. 359, 120 N. Y. Supp. 1004; *Martin v. Colby*, 42 Hun 1, 3 St. Rep. 415, 25 Week. Dig. 358.

86. *Klaweiter v. Hubner*, 68 Hun 338, 22 N. Y. Supp. 815.

87. *Kmetz v. De Ronde*, 231 N. Y. 255.

88. *Bruce v. Tilson*, 25 N. Y. 194; *Sherman v. Wright*, 49 N. Y. 227; *Peters v. Delapaine*, 49 N. Y. 362; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, reversing, 14 Jones & S. 305; *Murdfeldt v. New York, etc., R. Co.*, 102 N. Y. 703, 1 Silv. 93; *Day v. Hunt*, 112 N. Y. 191; *Conger v. New York, etc., R. Co.*, 120 N. Y. 29; *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294; *Dunckel v. Dunckel*, 141 N. Y. 427; *Heller v. Cohen*, 154 N. Y. 299; *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60; *Butler v. Wright*, 186 N. Y. 259; *Dyker Meadow Land & Imp. Co. v. Cook*, 159 N. Y. 6; *Finkel v. Kohn*, 38 App. Div. 199, 56 N. Y. Supp. 569; *Darrow v. Bush*, 45 App. Div. 262, 61 N. Y. Supp. 2; *Town of Huntington v. Titus*, 50 App. Div. 468, 64 N. Y. Supp. 58, affirmed without opinion, 169 N. Y. 579; *Gilbert v. Bunnell*, 92 App. Div. 284, 86 N. Y. Supp. 1123; *Byrne v. Fremont Realty Co.*, 120 App. Div. 692, 105 N. Y. Supp. 838; *National*

Cash Register Co. v. Remington Arms Co., 212 App. Div. 343, 209 N. Y. Supp. 40; *Northrup v. Scott*, 85 Misc. 515, 148 N. Y. Supp. 846; *Menier v. Donald*, 98 Misc. 684, 165 N. Y. Supp. 50; *Watt v. Rogers*, 2 Abb. Pr. 261; *McWhorter v. McMahan, Clarke* 400, affirmed, 10 Paige 386; *Brush v. Vanderburgh*, 1 Edw. Ch. 21; *Ferris v. Plummer*, 42 Hun 440; *Coffin v. Lockhart*, 60 Hun 173, 14 N. Y. Supp. 719, 38 St. Rep. 13; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *St. John v. Benedict*, 6 Johns. Ch. 111; *Wilbur v. Gold & Stock Teleg. Co.*, 20 Jones & S. (52 Super. Ct.) 189; *Covart v. Johnston*, 15 N. Y. Supp. 785, 40 St. Rep. 62, affirmed without opinion, 137 N. Y. 560; *Crouch v. Meyer*, 18 N. Y. Supp. 65, 47 St. Rep. 166; *Eickwort v. Powers*, 43 St. Rep. 328, 17 N. Y. Supp. 137. "It has always rested in a large degree in the discretion of the courts of equity, to grant or refuse specific performance, and it is uniformly denied when the contract is a hard one, or the circumstances of the parties or property have changed, or the party has slept upon his rights, or for any other reason the claim is unconscionable or unjust, or for any reason unequitable at the time when the aid of the court is invoked." *Bruce v. Tilson*, 25 N. Y. 194.

be granted or withheld upon a consideration of all the circumstances and in the exercise of a sound discretion.⁸⁹ This discretion does not mean free will.⁹⁰ It is governed by reason and by facts which make its judgment fair and just.⁹¹ It is a sound judicial discretion.⁹² The discretion is for the most part governed by settled rules; and where a plaintiff is seeking relief, to which, by such rules, he is clearly entitled, and no substantial defense to his claim is established, the relief should not be arbitrarily or capriciously denied.⁹³ The discretion is to be exercised only in the interest of justice and equity.⁹⁴

In ordinary cases, contracts for the sale or purchase of real property are enforced almost as a matter of course, with little, if any, discussion of the discretionary power of the court.⁹⁵ Indeed, it has been said that specific performance will not be refused for a cause which would not be an excuse for non-performance in an action at law.⁹⁶ If the contract has been entered into by competent parties, and is

89. *Williams v. Montgomery*, 148 N. Y. 519; *McPherson v. Schade*, 149 N. Y. 16; *Heller v. Cohen*, 154 N. Y. 299; *Winne v. Winne*, 166 N. Y. 263; *International Paper Co. v. Hudson River Water Power Co.*, 92 App. Div. 56, 86 N. Y. Supp. 736; *Jones v. Barnes*, 105 App. Div. 287, 94 N. Y. Supp. 695; *Stitt v. Ward*, 142 App. Div. 626, 127 N. Y. Supp. 351; *Hall v. Hartford*, 50 Misc. 133, 100 N. Y. Supp. 392; *Martin v. Platt*, 5 St. Rep. 284; *Burling v. King*, 2 T. & C. 545, 46 How. Pr. 452.

90. *Hammer v. Michael*, 243 N. Y. 445.

91. *Hammer v. Michael*, 243 N. Y. 445.

92. *Viele v. Troy & Boston R. Co.*, 21 Barb. 381, affirmed, 20 N. Y. 184; *McWhorter v. McMahan, Clarke*, 400, affirmed, 10 Paige 386.

93. *Dunkel v. Dunkel*, 141 N. Y. 427; *Bennet v. Bennet*, 10 App. Div. 550, 42 N. Y. Supp. 435; *Frain v. Klein*, 18 App. Div. 64, 45 N. Y. Supp. 394; *Forsyth v. Leslie*, 74 App. Div. 517, 77 N. Y. Supp. 826; *Hill v. Ressegien*,

17 Barb. 162; *Losee v. Morey*, 57 Barb. 561; *Bowen v. Irish Presbyterian Congregation*, 6 Bosw. (19 Super. Ct.) 245; *Seymour v. Delancy*, 3 Cow. 445, reversing, 6 Johns. Ch. 222; *Dodge v. Miller*, 61 Hun 102, 30 N. Y. Supp. 726, 62 St. Rep. 681.

94. *Darrow v. Bush*, 45 App. Div. 262, 61 N. Y. Supp. 2; *Brody A. & K. Co. v. Hochstadter*, 160 App. Div. 310, 144 N. Y. Supp. 631; *Maury v. Post*, 55 Hun 454, 8 N. Y. Supp. 714, 29 St. Rep. 827; *Seymour v. DeLancy*, 3 Cow. 443, reversing, 6 Johns. Ch. 222; *Martin v. Platt*, 5 St. Rep. 284.

95. *Failure to perform another contract.*—Equity will not deny relief to the assignee of a purchaser merely because the original purchaser, together with another person, owes the vendor the purchase price of another lot and that obligation is probably uncollectible. *Seaman v. Van Rensselaer*, 10 Barb. 81.

96. *Froehlich v. Holding Co.*, 116 Misc. 275, 190 N. Y. Supp. 324, affirmed, 201 App. Div. 855, 192 N. Y. Supp. 925.

in its nature and circumstances unobjectionable, it is as much a matter of course to decree specific performance, as it is to give damages at law.⁹⁷

2. Relief inequitable.

If the circumstances are such that it appears to the court that it would be unjust or inequitable to require the specific performance of a contract, in the exercise of its discretion, the court may refuse to grant the relief.⁹⁸ It is immaterial whether the fact that the contract is inequitable arises from the provisions of the contract, or from any external facts or circumstances which affect the situation and the relations of the parties, for in either case it may constitute a sufficient ground for a court of equity to withhold this peculiar relief

97. *Rochester & Kettle Falls Land Co. v. Roe*, 8 App. Div. 360, 40 N. Y. Supp. 799, 75 St. Rep. 179, *Bennet v. Bennet*, 10 App. Div. 550, 42 N. Y. Supp. 435; *Seymour v. Delancy*, 3 Cow. 445, reversing, 6 Johns. Ch. 222.

98. *Bruce v. Tilson*, 25 N. Y. 194; *Sherman v. Wright*, 49 N. Y. 227; *Peters v. Delapaine*, 49 N. Y. 362; *Winne v. Winne*, 166 N. Y. 263; *Scheinberg v. Scheinberg*, 249 N. Y. 277; *Rochester & Kettle Falls Land Co. v. Roe*, 8 App. Div. 360, 40 N. Y. Supp. 799, 75 St. Rep. 179; *Bennet v. Bennet*, 10 App. Div. 550, 42 N. Y. Supp. 435; *Frain v. Klein*, 18 App. Div. 64, 45 N. Y. Supp. 394; *Finkel v. Kohn*, 38 App. Div. 199, 56 N. Y. Supp. 569; *Town of Huntington v. Titus*, 50 App. Div. 468, 64 N. Y. Supp. 58, affirmed without opinion, 169 N. Y. 579; *Byrne v. Fremont Realty Co.*, 120 App. Div. 692, 105 N. Y. Supp. 838; *National Cash Register Co. v. Remington Arms Co.*, 212 App. Div. 343, 209 N. Y. Supp. 40; *Hart v. Brown*, 6 Misc. 238, 27 N. Y. Supp. 74; *Hall v. Hartford*, 50 Misc. 133, 100 N. Y. Supp. 392; *Klingenstein v. Alexander*, 57 Misc. 236, 109 N. Y. Supp. 143; *Northrup v. Scott*, 85 Misc. 515, 148 N. Y. Supp. 846; *Lynch v. Bis-*

choff, 15 Abb. Pr. 357n; *Matthews v. Terwilliger*, 3 Barb. 50; *Clarke v. Rochester, etc., R. Co.*, 18 Barb. 350; *Viele v. Troy & Boston R. Co.*, 21 Barb. 381, affirmed, 20 N. Y. 184; *McWhorter v. McMahan, Clarke* 400, affirmed, 10 Paige 386; *Seymour v. Delancy*, 3 Cow. 445, reversing, 6 Johns. Ch. 222; *Fitzpatrick v. Dorland*, 27 Hun 291; *Maurv v. Post*, 55 Hun 454, 8 N. Y. Supp. 714, 29 St. Rep. 827, *Hock v. Cochs*, 78 Hun 253, 28 N. Y. Supp. 952, 60 St. Rep. 229; *Slocum v. Crosson*, 1 How. App. Cas. 705, 751, 758; *Cameron Coal Co. v. Emanuel*, 17 Jones & S. (49 Super. Ct.) 77; *Lennon v. Stiles*, 2 Silv. Sup. Ct. 145, 4 N. Y. Supp. 487, 17 St. Rep. 870, affirmed, 24 St. Rep. 390, 5 N. Y. Supp. 870.

Authority of auctioneer.—Where, during an auction, the principal denies that the property has been knocked down to the proper party and asks that the sale be reopened, and on the refusal of the auctioneer to do so, revokes the agency, equity will not decree specific performance of a contract of sale subsequently executed by the auctioneer. *Byrne v. Fremont Realty Co.*, 120 App. Div. 692, 105 N. Y. Supp. 838.

and to leave the parties to their legal remedy.⁹⁹ Specific performance will not be decreed where it would result in great hardship or injustice to one party, without any considerable gain or utility to the other.¹ Courts of equity are to do equity and compel fair dealing. They do not aid clever attempts to escape just obligations.² Courts of equity will not interfere to enforce a hard and unconscionable bargain, but will leave the parties to their remedy at law.³ The courts will not aid a party who has taken an unfair advantage of another.* But, on the other hand, equity does not act as a guardian for competent parties; and does not refuse its jurisdiction because the agreement is more advantageous to one party than to the other, unless the advantage was acquired through means which shock good conscience.⁵

3. Mistake, fraud, accident, surprise.

Where, by reason of circumstances attending the making of the contract, such as fraud, accident or mistake, the enforcement of the equitable remedy would be inequitable and would produce results not within the intent or understanding of the parties when the bargain was made, the court may deny relief by specific performance and leave the parties to their legal remedies.⁶ Equity may decline juris-

99. *Stokes v. Stokes*, 155 N. Y. 590; *Lynch v. Buckley*, 82 App. Div. 614, 81 N. Y. Supp. 1070; *Stitt v. Ward*, 142 App. Div. 626, 127 N. Y. Supp. 351; *Hall v. Hartford*, 50 Misc. 133, 100 N. Y. Supp. 392.

1. *Murdfeldt v. New York, etc., R. Co.*, 102 N. Y. 703, 1 Silv. 93; *Conger v. New York, etc., R. Co.*, 120 N. Y. 29; *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294; *Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co.*, 144 N. Y. 152; *Coffin v. Lockhart*, 60 Hun 178, 14 N. Y. Supp. 719, 38 St. Rep. 13.

2. *Hammer v. Michael*, 243 N. Y. 445.

3. *Bruce v. Tilson*, 25 N. Y. 194; *Scheinberg v. Scheinberg*, 249 N. Y. 277; *Rochester & Kettle Falls Land Co. v. Roe*, 8 App. Div. 360, 40 N. Y. Supp. 799, 75 St. Rep. 179; *Bennet v.*

Bennet, 10 App. Div. 550, 42 N. Y. Supp. 435; *Frain v. Klein*, 18 App. Div. 64, 45 N. Y. Supp. 394; *Lynch v. Bischoff*, 15 Abb. Pr. 357n; *Cuff v. Dorland*, 55 Barb. 481, reversed on other grounds, 57 N. Y. 360; *McWhorter v. McMahan, Clarke* 400, affirmed, 10 Paige 386; *Seymour v. Delancy*, 3 Cow. 445, reversing, 6 Johns. Ch. 222; *Slocum v. Crosson*, 1 How. App. Cas. 705, 751, 758; *Covart v. Johnston*, 15 N. Y. Supp. 785, 40 St. Rep. 62, affirmed without opinion, 137 N. Y. 560; *Scheinberg v. Scheinberg*, 249 N. Y. 277; *Lennon v. Stiles*, 2 Silv. Sup. Ct. 145, 4 N. Y. Supp. 487, 17 St. Rep. 870, affirmed, 24 St. Rep. 390, 5 N. Y. Supp. 870.

5. *Gotthelf v. Stranahan*, 19 N. Y. Supp. 161, 46 St. Rep. 312, modified, 138 N. Y. 345.

6. *Bennet v. Bennet*, 10 App. Div.

diction, although the contract has sufficient validity to justify an action at law.⁷ If, by reason of an excusable mistake of a party, the enforcement of a contract in equity would be unjust, the courts may refuse the relief.⁸ The remedy may be denied, if the contract by mistake of the parties does not represent the actual agreement of the parties.⁹ A party is not entitled to a decree in specific performance

550, 42 N. Y. Supp. 435; *Finkel v. Kohn*, 38 App. Div. 199, 56 N. Y. Supp. 569; *Lynch v. Bischoff*, 15 Abb. Pr. 357n; *McWhorter v. McMahan*, Clarke 400, affirmed, 10 Paige 386; *Schmidt v. Livingston*, 3 Edw. Ch. 213; *Slocum v. Closson*, 1 How. App. Cas. 705, 751, 758; *Crouch v. Meyer*, 18 N. Y. Supp. 65, 47 St. Rep. 166; *Dempsey v. O'Rourke*, 156 N. Y. Supp. 925; *Best v. Stow*, 2 Sandf. Ch. 293.

7. *Lynch v. Bischoff*, 15 Abb. Pr. 357n; *Matthews v. Terwilliger*, 3 Barb. 50; *Seymour v. Delancy*, 3 Cow. 445, reversing, 6 Johns. Ch. 222; *Crouch v. Meyer*, 18 N. Y. Supp. 65, 47 St. Rep. 166.

8. *Hammer v. Michael*, 243 N. Y. 445.

9. *Finkel v. Kohn*, 38 App. Div. 199, 56 N. Y. Supp. 569; *Paul v. Swears*, 138 App. Div. 638, 122 N. Y. Supp. 740; *Bowman v. McClenahan*, 19 Misc. 438, 44 N. Y. Supp. 482, affirmed, 20 App. Div. 346, 46 N. Y. Supp. 945; *McIntyre v. Harrington*, 43 Misc. 94, 87 N. Y. Supp. 1028; *Lynch v. Bischoff*, 15 Abb. Pr. 357n; *Matthews v. Terwilliger*, 3 Barb. 50; *Cuff v. Dorland*, 55 Barb. 481, reversed on other grounds, 57 N. Y. 560; *Cameron Coal Co. v. Emanuel*, 17 Jones & S. (49 Super. Ct.) 77; *Crouch v. Meyer*, 18 N. Y. Supp. 65, 47 St. Rep. 166; *Best v. Stow*, 2 Sandf. Ch. 293; *Morganthau v. White*, 1 Sweeny (31 Super. Ct.) 395.

Subject to lease.—Specific performance of a purchase of land at auction will not be decreed where the purchaser bid without knowledge of the

fact that the sale was made subject to an unexpired lease, and he purchased for immediate use. *Bowman v. McClenahan*, 19 Misc. 438, 44 N. Y. Supp. 482, affirmed, 20 App. Div. 346, 46 N. Y. Supp. 945.

Lot larger than supposed.—Where at the time of a contract of sale, the premises were thought to have certain dimensions, but were afterwards found to be much larger, specific performance will not be compelled. *Schmidt v. Livingston*, 3 Edw. Ch. 213.

Mistake in area.—A purchaser will not be compelled to perform an executory contract for the sale of a rectangular plot of suburban residence property, where it appears that in purchasing he relied upon a newspaper advertisement, authorized by the equitable owner of the property, which falsely but not fraudulently represented the frontage as fifty-four feet greater than it was in fact and the depth as more than one hundred feet greater than it was in fact, thus making a shortage in the area of the land of about one-third, it appearing that both parties were mistaken as to the area. *McIntyre v. Harrington*, 43 Misc. 94, 87 N. Y. Supp. 1028.

Cemetery lands.—Where an owner contracted to convey "all the land owned by him," in a certain town, the purchaser cannot compel him to give a deed of an undivided interest in a cemetery lot, which the owner did not intend to convey. *Covart v. Johnston*, 15 N. Y. Supp. 785, 40 St. Rep. 62, affirmed without opinion, 137 N. Y. 560.

where the other contracting party was taken by "surprise," that is, where he had not sufficient time to act with caution, and an undue advantage has been taken of the situation.¹⁰ The remedy will not be granted where there has been an improper suppression of a fact by one party, or, where at the time of entering into the contract, one party was cognizant of a fact of which the other was not informed, so that what was certain as to one, was represented as, or was in fact, uncertain to the other.¹¹ A contract which is induced by a misrepresentation of a material fact cannot be enforced in equity.¹² In an action by a wife to compel her husband specifically to perform an agreement for her maintenance, he may set up in his answer that the marriage of the parties was procured by the fraudulent representations of the wife; as such facts bear upon the discretion of the court in granting the relief sought.¹³

4. Inadequate consideration.

In the exercise of its discretion, a court of equity may deny the specific enforcement of a contract where the consideration moving to the defendant is so inadequate that the court deems the contract inequitable.¹⁴ A "meritorious" consideration is required.¹⁵ The contract must be based on a "valuable" consideration.¹⁶ Equitable relief may be denied although the consideration is sufficient to cause courts of law to sustain the contract. Thus, if a purchaser lives in proximity to a lot and knows a recent increase in value of lots in that vicinity and does not disclose his knowledge to the owner who lives at some distance, equity will not enforce the contract.¹⁷

The rule does not contemplate that the court will exercise a general supervision over the contracts of competent parties

10. *Matthews v. Terwilliger*, 3 Barb. 50; *Morganthau v. White*, 1 Sweeney (31 Super. Ct.) 395.

11. *Lynch v. Bischoff*, 15 Abb. Pr. 357n; *Livingston v. Peru Iron Co.*, 2 Paige 390.

12. *Boe v. Berry*, 24 Week. Dig. 5.

13. *Everitt v. Everitt*, 206 App. Div. 408, 201 N. Y. Supp. 425.

14. *Margraf v. Muir*, 57 N. Y. 155; *Central Fireworks Co. v. Charlton*, 42 App. Div. 104, 53 N. Y. Supp. 900;

Lynch v. Bischoff, 15 Abb. Pr. 357n; *Seymour v. Delancy*, 3 Cow. 445, reversing, 6 Johns. Ch. 222; *Carpenter v. Carpenter*, 10 N. Y. Supp. 486, 32 St. Rep. 354; *Acker v. Phoenix*, 4 Paige 305.

15. *Williston v. Williston*, 41 Barb. 635; *Burling v. King*, 66 Barb. 633; *Woodcock v. Bennet*, 1 Cow. 711.

16. *Stokes v. Stokes*, 143 N. Y. 708; *Woodcock v. Bennet*, 1 Cow. 711.

17. *Margraf v. Muir*, 57 N. Y. 155.

and refuse relief merely because it seems that the contract is more advantageous to one party than to the other.¹⁸ Relief is denied on the ground of inadequacy of consideration only when the inadequacy is so great as to render the bargain hard or unconscionable,¹⁹ or, as stated in some of the cases, when it shocks the conscience of the court.²⁰

5. Prejudice to public interests.

The specific performance of a contract may be refused, as a matter of discretion, where public interests would be prejudiced by the performance.²¹ For example, the establishment of railroad station, pursuant to a contract with a railroad, may be refused where it would delay public travel.²² But the court will not regard the possibility of other actions as a reason for refusing specific performance, when a judgment is to be rendered which under the ordinary rule of *stare decisis* will control the determination of subsequent suits started for the same purpose.²³

6. Fiduciaries, incompetents, infants, etc.

The rights of infants have always been zealously guarded by the court of chancery. Hence a contract in which an infant is interested, such as a contract by his guardian, will not be specifically enforced unless the contract is strictly equitable and for the best interests of the infant.²⁴ One seeking specific performance of a guardian's contract, must show affirmatively that the contract is one which the guardian acting for the best interests of the infant might properly have made, and one such as the court would have authorized had its authority been sought.²⁵

18. *Robbins v. Clock*, 59 Misc. 289, 112 N. Y. Supp. 246; *Viele v. Troy & Boston R. Co.*, 21 Barb. 381.

19. *Williston v. Williston*, 41 Barb. 635; *Westervelt v. Matheson*, Hoff. Ch. 36. "Even inadequacy of consideration is no ground for refusing specific performance, unless it be so gross as to raise the presumption of fraud, unreasonableness, or great hardship." *Losee v. Morey*, 57 Barb. 561.

20. *Seymour v. Delancy*, 3 Cow. 445.
21. *Conger v. New York, etc., R. Co.*, 120 N. Y. 29; *Standard Fashion*

Co. v. Siegel-Cooper Co., 157 N. Y. 60.

22. *Conger v. New York, etc., R. Co.*, 120 N. Y. 29.

23. *Reformed Prot. Church v. Madison Ave. Bldg. Co.*, 214 N. Y. 268.

24. *Sherman v. Wright*, 49 N. Y. 227.

25. *Sherman v. Wright*, 49 N. Y. 227. "Where the rights of an infant defendant are involved, and it is not shown that both of the executors to whom was confided the power of sale have acted with reference to the price

The specific performance of an agreement among beneficiaries, which would thwart the intention of a testator and destroy a trust created for the benefit of an incompetent, will be refused.²⁶

The courts may refuse to decree the specific performance of a contract between an attorney and his client, whereby the attorney is to have a large share of the property in dispute as compensation for his services, and may leave the attorney to an action at law.²⁷

7. Plaintiff not having acted in good faith.

A party seeking relief by way of specific performance must come into court with clean hands, and, seeking equity, must do equity.²⁸ If the agreement appears to have been made to defeat or defraud a creditor of the plaintiff, or an intervening purchaser at a sheriff's sale, a specific performance will not be decreed.²⁹

The courts do not approve of the practice of a purchaser speculating at the expense of the seller, as where the purchaser tries to place himself in a position where he can accept the title if he can make a profitable turn of the property, or decline it if he is unable to realize a profit.³⁰ Specific performance may be refused when it appears that the case is in this class.³¹

8. Change in circumstances after execution of contract.

It has been said that a contract is to be judged as of the time it was made, and, if fair when made, the fact that it

to be realized, it is clear, we believe, that it would be inequitable to compel the specific performance of a contract which would result in a loss of several thousand dollars to the real party in interest, the infant defendant, and give to the plaintiff an unfair bargain." *Lynch v. Buckley*, 82 App. Div. 614, 81 N. Y. Supp. 1070.

26. *Rochevot v. Rochevot*, 74 App. Div. 585, 77 N. Y. Supp. 788.

27. *Burling v. King*, 2 T. & C. 545, 46 How. Pr. 452.

28. *York v. Searles*, 97 App. Div. 331, 90 N. Y. Supp. 37, affirmed without opinion, 189 N. Y. 573; *Dodge v. Miller*, 81 Hun 102, 30 N. Y. Supp.

726, 62 St. Rep. 681; *Dempsey v. O'Rourke*, 156 N. Y. Supp. 925.

29. *St. John v. Benedict*, 6 Johns. Ch. 111.

30. *Klingenstein v. Alexander*, 57 Misc. 236, 109 N. Y. Supp. 143.

Knowledge of defect.—One knowing of defect in the title of premises he is purchasing and taking a contract for purchase without mention of the defect, will not be allowed specific performance with an abatement in the purchase price. The knowledge of the purchaser may be shown by parol. *Warren v. Hall*, 41 Hun 466.

31. *Arrow Holding Co. v. McLaughlin's Sons*, 116 Misc. 555, 190 N. Y. Supp. 720.

has become a hard one by the force of subsequent circumstances or changing events will not necessarily prevent its specific performance.³² But specific enforcement of a contract has been denied where, by reason of a subsequent change in conditions, it became inequitable to decree the performance.³³ The courts, in a proper case, may deny the relief where the contract was equitable when made, but was inequitable when enforcement was sought.³⁴ To bring this rule into operation, it is necessary that subsequent conditions which materially affected the contract, were not the result of any default of the defendant, and were not such as should have been within the contemplation of the parties when the contract was executed.³⁵ And it has been held that relief will not be denied on this ground, unless the change has made the performance so onerous that the enforcement will impose great hardship on one party and will be of little or no benefit to the other party.³⁶ The fact that the purchaser fails to effect a sale to a third person, as he expected to do when he made the contract to purchase the premises, will not relieve him.³⁷

Where one contracts for property intending to use it for a specific purpose, and thereafter zoning ordinances are adopted which forbid the purposed use, equity may decline to direct the performance of the contract.³⁸ But, if the zon-

32. Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co., 144 N. Y. 152.

33. Merchants Bank v. Thompson, 55 N. Y. 7; Trustees of Columbia College v. Thacher, 87 N. Y. 311, reversing, 14 Jones & S. 305; Town of Huntington v. Titus, 50 App. Div. 468 64 N. Y. Supp. 58, affirmed without opinion, 169 N. Y. 579; Hart v. Brown, 6 Misc. 238, 27 N. Y. Supp. 74; Maupai v. Jackson, 64 Misc. 407, 118 N. Y. Supp. 513, affirmed, 139 App. Div. 524, 124 N. Y. Supp. 220; Fitzpatrick v. Dorland, 27 Hun 291; Conger v. New York, etc., R. Co., 45 Hun 296, 10 St. Rep. 392, affirmed, 120 N. Y. 29; Styles v. Blume, 30 N. Y. Supp. 409, 61 St. Rep. 131.

34. Hart v. Brown, 6 Misc. 238, 27 N. Y. Supp. 74.

35. Froehlich v. Holding Co., 116 Misc. 275, 190 N. Y. Supp. 324, affirmed, 201 App. Div. 855, 192 N. Y. Supp. 925.

36. Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co., 144 N. Y. 152.

37. Northrup v. Gibbs, 1 N. Y. Supp. 465, 17 St. Rep. 320, 28 Week. Dig. 505.

38. Anderson v. Steinway & Sons, 178 App. Div. 507, 165 N. Y. Supp. 608, affirmed, 221 N. Y. 639. See also, Albany Heights Realty Co. v. Vogt, 182 App. Div. 736, 169 N. Y. Supp. 1049; Williams v. Eldred Refining Co., Inc., 130 Misc. 721, 224 N. Y. Supp. 349. See also, Biggs v. Steinway & Sons, 229 N. Y. 320, where the zoning regulations affecting an adjoining parcel, did not require a denial of relief,

ing regulations were adopted before the making of the contract, enforcement may be granted although the purchaser had no knowledge thereof.³⁹

Where the performance of a contract for the sale of land has been prevented and delayed for many years by the pendency of a litigation commenced before it was made, and during that time the property has increased in value, and has also become heavily incumbered by assessments, taxes and mortgages, and especially when the situation and condition of the parties have been materially changed and altered, without any fault on the part of the vendor, the court will not decree the specific performance of the contract.⁴⁰

9. Laches of plaintiff.

The laches of the plaintiff in seeking the remedy of specific performance may, in the discretion of the court, furnish a ground for the denial of the relief, particularly if the condition of the parties or of the premises has changed during the delay. This question is allied to the operation of the Statute of Limitations, and is referred to in another subdivision.⁴¹

10. Burden of proof.

In an action to compel the specific performance of a land contract, as a general rule, the plaintiff is bound to show that the relief sought will be equitable and just, and the defendant is not required to plead considerations which render such relief inequitable.⁴²

11. Review by Court of Appeals of discretion of lower court.

Where the relief is granted or denied as a matter of discretion, the Court of Appeals will not interfere with the action of the lower courts, if no fixed rules of equity are thereby violated.⁴³ Where neither hardship nor injustice

although the purchaser would not be able to carry out his purpose of constructing a business building on all of the lots.

39. *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313.

40. *Fitzpatrick v. Dorland*, 27 Hun 291.

41. See, *infra*, III-H-3, Laches.

42. *Eiseman v. Josephthal*, 71 Misc. 288, 128 N. Y. Supp. 699; *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294.

43. *Dunkel v. Dunkel*, 141 N. Y. 427.

results to the defeated party, the Court of Appeals will not interfere with the discretion of the court below.⁴⁴ The action of the court below will not be disturbed unless it was clearly wrong.⁴⁵ The power of the Appellate Division, however, is not so limited in the review of discretionary decisions of the Special Term.⁴⁶

X. Adequacy of another remedy.

It is sometimes urged as a defense to an action of specific performance that, inasmuch as the circumstances would not justify any remedy at law, courts of equity should refuse to exercise its jurisdiction. This objection, however, is clearly untenable, for relief is frequently granted when no relief at law could be granted.⁴⁷ The inadequacy of a legal remedy is one of the considerations upon which this branch of equity jurisprudence is founded.⁴⁸ Thus, in equity, contracts within the Statute of Frauds are enforced, where the plaintiff seeks relief on the ground of part performance of the verbal contract.⁴⁹ A failure to make a strict and literal performance of the contract, although it might preclude a remedy at law, may in equity constitute no bar to relief.⁵⁰

44. *Day v. Hunt*, 112 N. Y. 191.

45. *Kelso v. Lorillard*, 85 N. Y. 177, affirming, 8 Daly 300.

46. *Rochester & Kettle Falls Land Co. v. Roe*, 8 App. Div. 360, 40 N. Y. Supp. 799, 75 St. Rep. 179.

47. *Winne v. Winne*, 166 N. Y. 263; *Phalen v. United States Trust Co.*, 196 N. Y. 178; *Watt v. Rogers*, 2 Abb. Pr. 261; *Seymour v. Delancy*, 3 Cow. 445, reversing, 6 Johns. Ch. 222.

48. *Winne v. Winne*, 166 N. Y. 263. "The principle that a suit in equity may be maintained for the specific performance of an agreement, although an action at law could not be based upon it, is illustrated by cases of the transfer of the possibility or expectancy of estates, assignments of things in action, contracts of married women, agreements invalid under the Statute of Frauds, agreements for the sale of land where the death of the vendor ensues before completion, agreements

between a man and woman who afterwards marry, and verbal contracts which have been partially performed. In these and in many other cases, although an action at law could not be maintained, courts of equity hold such contracts as binding and decree their specific performance if free from objections which would generally prevent equitable relief." *Winne v. Winne*, 166 N. Y. 263.

49. *Rindge v. Baker*, 57 N. Y. 209; *Stone v. 434 Broadway Realty Corp.*, 113 Misc. 178, 184 N. Y. Supp. 116. Compare, *Lasher v. McDermott*, 173 App. Div. 79, 158 N. Y. Supp. 708, appeal dismissed without opinion, 219 N. Y. 554. And see, *supra*, II-S, Verbal contracts.

50. *Day v. Hunt*, 112 N. Y. 191; *Watt v. Rogers*, 2 Abb. Pr. 261. See, *infra*, II-Y-2, Literal performance not required.

On the other hand, it is frequently urged in a case where the relief at law is ample that equity should not assume jurisdiction of the controversy.⁵¹ When one is seeking to enforce a contract for the sale or purchase of real estate, the fact that the remedy for damages might give adequate relief, will not defeat the action.⁵² Although the contract provides for liquidated damages, unless it further provides that such damages shall constitute the sole relief, an action of specific performance may be maintained.⁵³ But the situation is quite different when one sues for the specific enforcement of a contract relating to personal property. In such a case, the relief will not be granted when an adequate remedy at law exists.⁵⁴ In some cases an action of replevin will afford a satisfactory remedy for the recovery of chattels; and, in such a case, specific performance may rightly be denied.⁵⁵ Contracts for the payment of money are similarly classed, and the equity action will fail when the plaintiff has an adequate remedy at law for such a recovery.⁵⁶ The fact that the debtor is insolvent does not justify a resort to equity.⁵⁷ Contracts for the rendition of services

51. "The original foundation of the decrees of courts of equity for a specific performance of contracts, we are told, was simply this: that damages of law would not give the party a compensation to which he was entitled, that it would not place him in a situation as beneficial as if the agreement were specifically performed. On this ground, courts of equity, in a variety of cases, have refused to interfere where the damages recoverable at law were commensurate with the injury sustained." *Wright v. Taylor*, 9 Wend. 538.

52. *Crary v. Smith*, 2 N. Y. 60; *Jones v. Barnes*, 105 App. Div. 287, 94 N. Y. Supp. 695; *Belanewsky v. Gallagher*, 55 Misc. 150, 105 N. Y. Supp. 77; *Losee v. Morey*, 57 Barb. 561. And see, *supra*, II-K, Contracts relating to real estate.

53. *Palmer v. Gould*, 18 N. Y. Supp. 638, reversed on other grounds, 144 N. Y. 671; *Dealy v. Klapp*, 199 App. Div. 150, 191 N. Y. Supp. 457. See also,

on subsequent appeal, *Dealy v. Klapp*, 203 App. Div. 216, 196 N. Y. Supp. 702, affirmed without opinion, 236 N. Y. 631.

54. *Bateman v. Straus*, 86 App. Div. 540, 83 N. Y. Supp. 785; *Gilbert v. Bunnell*, 92 App. Div. 284, 86 N. Y. Supp. 1123; *Rawll v. Baker-Vawter Co.*, 187 App. Div. 330, 176 N. Y. Supp. 189. And see, *supra*, II-L, Contracts relating to personal property.

55. *Rawll v. Baker-Vawter Co.*, 187 App. Div. 330, 176 N. Y. Supp. 189.

56. *Williams v. Boyle*, 1 Misc. 364, 20 N. Y. Supp. 720, 48 St. Rep. 713; *Morgenstern v. Burkhardt*, 9 Misc. 417, 30 N. Y. Supp. 190, 61 St. Rep. 701; *Blank v. La Montague, etc., Co.*, 123 Misc. 238, 205 N. Y. Supp. 45; *Martin v. Platt*, 5 St. Rep. 284. And see, *supra*, II-G, Advance or payment of money.

57. *Blank v. La Montague, etc., Co.*, 123 Misc. 238, 205 N. Y. Supp. 45. Compare, *Petrolia Mfg. Co. v. Jenkins*, 29 App. Div. 403, 51 N. Y. Supp. 1028.

will not be enforced in equity, if there exists an adequate remedy at law.⁵⁸

If no legal proceedings of any kind are necessary to protect the rights of a party, an action of specific performance may be dismissed.⁵⁹

Y. Performance by plaintiff.

1. In general.

It is a fundamental rule that the plaintiff must show that he has performed the conditions of the contract to be performed by him; and, if he fails to do so, he cannot maintain an action for specific performance.⁶⁰ A party seeking to enforce a contract must allege and prove that he has performed its conditions upon his part, or that he has been able and willing and still is ready to perform. No action on the part of the defendant is required to prevent a recovery, where the plaintiff is in default. The mere fact of the existence of the default precludes the recovery.⁶¹ A party may

58. *Braun v. Ochs*, 77 App. Div. 20, 79 N. Y. Supp. 100; *Rosenberg v. Wilson*, 120 App. Div. 554, 104 N. Y. Supp. 1087, affirmed without opinion, 189 N. Y. 545.

59. *Maisal v. Shanholt*, 189 App. Div. 831, 179 N. Y. Supp. 292; *Danahy v. Fagan*, 63 Misc. 658, 117 N. Y. Supp. 300; *Nanny v. Fancher*, 15 N. Y. Supp. 628.

60. *Steinhardt v. Baker*, 163 N. Y. 411; *Youssoupoff v. Widener*, 246 N. Y. 174; *Hudson River Water Power Co. v. Glens Falls Portland Cement Co.*, 107 App. Div. 548, 95 N. Y. Supp. 421; *Flanders v. Rosoff*, 111 App. Div. 1, 97 N. Y. Supp. 514, affirmed without opinion, 188 N. Y. 616; *Pittsburgh Amusement Co. v. Ferguson*, 115 App. Div. 241, 101 N. Y. Supp. 217, affirmed without opinion, 193 N. Y. 635; *Pratt v. Clark*, 118 App. Div. 633, 103 N. Y. Supp. 612, appeal dismissed, 196 N. Y. 502; *Downs v. Lehman*, 123 App. Div. 11, 107 N. Y. Supp. 329; *Clark v. West*, 137 App. Div. 23, 122 N. Y. Supp. 380, affirmed without opinion, 201 N. Y. 569; *Grennel v. Greater New York Development Co.*, 153 App. Div.

362, 138 N. Y. Supp. 511, affirmed without opinion, 214 N. Y. 642; *Dickerson v. Menschel*, 188 App. Div. 547, 177 N. Y. Supp. 376; *Martin v. Johnston*, 6 Misc. 310, 26 N. Y. Supp. 1105, 58 St. Rep. 296, affirmed, 148 N. Y. 740; *Weintraub v. F. N. B. Realty Co., Inc.*, 196 App. Div. 525, 187 N. Y. Supp. 904; *Sire v. Long Acre Square Bldg. Co.*, 50 Misc. 29, 100 N. Y. Supp. 307; *Charlton v. Sheil*, 95 Misc. 321, 158 N. Y. Supp. 944; *Moss v. Rubenstein*, 117 Misc. 385, 191 N. Y. Supp. 496; *Youssoupoff v. Widener*, 126 Misc. 491, 215 N. Y. Supp. 24; *Voorhees v. De Meyer*, 2 Barb. 37, affirming, 3 Sandf. Ch. 614; *Babcock v. Emrich*, 64 How. Pr. 435; *Emrich v. White*, 66 How. Pr. 154, affirmed, 102 N. Y. 657; *Dow v. Iowa Central R. Co.*, 70 Hun 186, 24 N. Y. Supp. 292, 53 St. Rep. 898, affirmed, 144 N. Y. 426; *Hatch v. Cobb*, 4 Johns. Ch. 559.

61. *Link Realty & Constr. Co. v. Public Constr. Co.*, 169 App. Div. 88, 153 N. Y. Supp. 1032, affirmed without opinion, 222 N. Y. 699; *McWhorter v. McMahan*, Clarke 400, affirmed, 10 Paige 386; *Dow v. Iowa Central R.*

not trifle with his contracts and still ask the aid of a court of equity. He who seeks this species of relief must not have been guilty of negligence, but must show that he has been ready, desirous, prompt and eager.⁶²

2. Literal performance not required.

Equity does not require that the plaintiff have strictly and literally complied with the terms of his contract.⁶³ The very fact that the plaintiff has not strictly performed his part and so is without remedy at law, is sometimes a sufficient reason for the interference of courts of equity, where relief is given, notwithstanding the default, according to the merits of the case.⁶⁴ Relief may be allowed in an action of specific performance though the plaintiff has not complied with the strict terms of his contract, and hence could not have maintained an action at law.⁶⁵ Yet equity will grant its indulgence in this respect only when the plaintiff makes out a case reasonably free from doubt, shows that the relief he seeks is equitable under all the circumstances, and accounts in a reasonable manner for his delay and apparent omission of duty.⁶⁶ Relief will not be granted to a party in default where his failure to perform arose from his determination to abandon the contract, or where the other party in reliance upon the default or apparent abandonment has acted to his prejudice.⁶⁷

3. When time is of essence.

Where time is not of the essence of the contract, a delay by a party does not necessarily preclude a remedy by specific performance.⁶⁸ It may be stated as a general rule that, although a time is fixed in a contract for performance, unless

Co., 70 Hun 186, 24 N. Y. Supp. 292, 53 St. Rep. 898, affirmed, 144 N. Y. 426.

62. Hubbell v. Van Schoening, 49 N. Y. 331; Babcock v. Emrich, 64 How. Pr. 435; Willis v. Dawson, 34 Hun 492.

63. Reed v. St. John, 2 Daly 213.

64. Day v. Hunt, 112 N. Y. 191.

65. Delavan v. Duncan, 49 N. Y. 485; Day v. Hunt, 112 N. Y. 191; Harris v. Shorall, 230 N. Y. 343; Kane

Co. v. Jaretzki, 119 Misc. 419, 196 N. Y. Supp. 791; Watt v. Rogers, 2 Abb. Pr. 261; Voorhees v. De Meyer, 2 Barb. 37, affirming, 3 Sandf. Ch. 614; Buess v. Koch, 10 Hun 299, 53 How. Pr. 92.

66. Delavan v. Duncan, 49 N. Y. 485; Wood v. Perry, 1 Barb. 114; Tibbs v. Morris, 44 Barb. 138; Chase v. Hatch, 4 Rob. (27 Super. Ct.) 89.

67. Wood v. Perry, 1 Barb. 114.

68. Harris v. Shorall, 230 N. Y. 343.

the parties have by terms or implication agreed that such time shall be of the essence of the contract, the time is not of the essence.⁶⁹ Where the situation of the parties and the property remains unchanged up to the time of the trial, and the plaintiff has acted in good faith, relief will not necessarily be defeated by delay.⁷⁰ Time is not ordinarily regarded in equity as the essence of the contract, unless the

69. *Duffy v. O'Donovan*, 46 N. Y. 223; *Hubbell v. Von Schoening*, 49 N. Y. 326; *Myers v. De Mier*, 52 N. Y. 647; *Day v. Hunt*, 112 N. Y. 191; *Schmidt v. Reed*, 132 N. Y. 108; *Kahn v. Chapin*, 152 N. Y. 305; *Lese v. Lamprecht*, 196 N. Y. 32; *Davies v. Collins*, 25 App. Div. 272, 50 N. Y. Supp. 792; *Hun v. Bourdon*, 57 App. Div. 351, 69 N. Y. Supp. 112; *Murray v. Harbor, etc., Assn.*, 91 App. Div. 397, 86 N. Y. Supp. 799, affirmed on opinion below, 184 N. Y. 596; *Begen v. Pettus*, 144 App. Div. 476, 129 N. Y. Supp. 218; *Q. R. S. Co. v. Philipps-Jones Corp.*, 194 App. Div. 170, 185 N. Y. Supp. 127, affirmed, 233 N. Y. 626; *Strasbourg v. Hesu Realty Co., Inc.*, 198 App. Div. 805, 191 N. Y. Supp. 133; *Platt v. Zimmerman*, 13 Misc. 519, 34 N. Y. Supp. 694, 68 St. Rep. 734; *Eppig v. Gruhn*, 94 Misc. 443, 159 N. Y. Supp. 549; *Fordham Triangle Realty Co. v. Boyle*, 125 Misc. 324, 209 N. Y. Supp. 695; *Chase v. Hogan*, 3 Abb. Pr. N. S. 57, reversing, 6 Bosw. (19 Super. Ct.) 431; *Voorhees v. De Meyer*, 2 Barb. 37, affirming, 3 Sandf. Ch. 614; *Viele v. Troy & Boston R. Co.*, 21 Barb. 381, affirmed, 20 N. Y. 184; *McWilliam v. Long*, 32 Barb. 194, 19 How. Pr. 547; *Kerr v. Purdy*, 50 Barb. 24; *Seymour v. Delancy*, 3 Cow. 445, reversing, 6 Johns. Ch. 222; *Benson v. Tilton*, 24 How. Pr. 494, affirmed, 41 N. Y. 619; *Codding v. Wamsley*, 1 Hun 585, 4 T. & C. 49, affirmed, 60 N. Y. 644; *Richmond v. Foote*, 3 Lans. 244; *Northrup v. Gibbs*, 1 N. Y. Supp. 465, 17 St. Rep. 320, 28 Week. Dig. 505; *Shipman v. Cummins*, 19 N. Y. Supp. 974, 47 St. Rep.

416; *More v. Smedburgh*, 8 Paige 600, affirmed, 26 Wend. 238; *Edgerton v. Peckham*, 11 Paige 352; *Jerome v. Scudder*, 2 Rob. (25 Super. Ct.) 169. "In an action to compel the specific performance of a contract for the sale of real estate, time is not of the essence of the contract unless in the agreement it is clearly and expressly stipulated that it shall be so. The mere insertion in the contract of a day for its completion does not make such time the essence of the contract, and it will not be implied as essential except where the subject of the sale has a fluctuating value, or where the object of the contract is a commercial enterprise, or the delay in completion would involve one of the parties in a serious loss. When time is not by stipulation or by implication of the essence of the contract a court of equity will disregard it and decree specific performance when an action of law has been lost by default of the party seeking performance, if it be conscientious that the agreement be performed. The fact that the party may not have an action at law is a reason for a decree for specific performance. *Hun v. Bourdon*, 57 App. Div. 351, 69 N. Y. Supp. 112.

70. *Duffy v. O'Donovan*, 46 N. Y. 223; *Hubbell v. Von Schoening*, 49 N. Y. 326; *Murray v. Harbor, etc., Assn.*, 91 App. Div. 397, 86 N. Y. Supp. 799, affirmed on opinion below, 184 N. Y. 596; *Strasbourg v. Hesu Realty Co., Inc.*, 198 App. Div. 805, 191 N. Y. Supp. 133; *Keating v. Gunther*, 10 N. Y. Supp. 734.

parties have so treated it, or it necessarily follows from the nature and circumstances of the contract.⁷¹

Although time is not of the essence, if performance was not made on the specified date, relief will not be granted to the party in default unless he shows some excuse for his delay, or some other equitable circumstance.⁷² Reasonable diligence is requisite to the relief.⁷³ And, if the delay is such that laches may be imputed,⁷⁴ or if the condition of the parties or of the premises has materially changed in the meantime,⁷⁵ enforcement will be refused, although originally time was not of the essence.⁷⁶

As indicated above, the parties may so contract that time is of the essence of the contract, and when competent parties have so agreed, one cannot insist upon a performance after the date fixed.⁷⁷ If the contract expressly states that time shall be of the essence of the contract, courts of equity are not justified in making some other contract for the parties.⁷⁸ A provision which makes the contract null and void after the specified date, makes time of the essence of the contract.⁷⁹ Time may be deemed of the essence, when the property affected is of changing value. The sale of animals or of a reversion is in this class.⁸⁰ Time may be of the essence of an option, but not of the performance of the contract created by the acceptance of the option.⁸¹

71. *Duffy v. O'Donovan*, 46 N. Y. 223.

72. *Lese v. Lamprecht*, 196 N. Y. 32; *Began v. Pettus*, 144 App. Div. 476, 129 N. Y. Supp. 218; *Platt v. Zimmerman*, 13 Misc. 519, 34 N. Y. Supp. 694, 68 St. Rep. 734; *Chase v. Hogan*, 3 Abb. Pr. N. S. 57, reversing, 6 Bosw. (19 Super. Ct.) 431; *Babcock v. Emrich*, 64 How. Pr. 435; *Benedict v. Lynch*, 1 Johns. Ch. 370; *Edgerton v. Peckham*, 11 Paige 352; *Chase v. Hatch*, 4 Rob. (27 Super. Ct.) 89.

73. *Schmidt v. Reed*, 132 N. Y. 108.

74. See, *infra*, III-R-3, Laches.

75. *Albany Heights Realty Co. v. Vogt*, 182 App. Div. 736, 169 N. Y. Supp. 1049. And see, *supra*, II-W-8, Change in circumstances after execution of contract.

76. *Albany Heights Realty Co. v.*

Vogt, 182 App. Div. 736, 169 N. Y. Supp. 1049.

77. *Blanchard v. Archer*, 93 App. Div. 459, 87 N. Y. Supp. 665; *Smith v. Browing*, 171 App. Div. 278, 157 N. Y. Supp. 71; *N. R. S. Realty Corp. v. Forman*, 220 App. Div. 591; 222 N. Y. Supp. 172; *Reede v. Schneider*, 47 How. Pr. 379, 3 T. & C. 104, 1 Hun 121; *Babcock v. Emrich*, 64 How. Pr. 435; *Codding v. Wamsley*, 1 Hun 585, 4 T. & C. 49, affirmed, 60 N. Y. 644; *Wells v. Smith*, 7 Paige 22.

78. *Edgerton v. Peckham*, 11 Paige 352.

79. *Blanchard v. Archer*, 93 App. Div. 459, 87 N. Y. Supp. 665.

80. *Gale v. Archer*, 42 Barb. 320; *Edgerton v. Peckham*, 11 Paige 352.

81. *Stanley v. Gannon*, 109 Misc. 611, 180 N. Y. Supp. 602.

Though time was not originally of the essence of the contract, it may become so, as by a subsequent arrangement between the parties definitely fixing the date for the consummation of the agreement. A refusal to grant an extension of time may require the parties to complete their deal on the fixed date,⁸² though equity for a good reason may allow further time, as, for example, to search the title.⁸³ A party not in default may serve a notice on the other party specifying a certain time when performance must be made, if at all; and thereupon such date may become of the essence.⁸⁴

4. Law day not fixed in contract.

Where the time for the performance of a contract is not specified therein, but the contract is valid and complete in all other respects, it is presumed that the parties intended it should be performed within a reasonable time, considering the circumstances under which it was executed, and the law, by implication, reads such intention into the contract as if it had originally been expressed therein. In such case it is incumbent upon either party desirous of preserving any legal remedy or availing himself of a defense at law for a breach of the contract, to put the other party in default by tendering performance on his part and demanding performance by the other party within a reasonable time specified.⁸⁵ The date of closing may be fixed by parol, for the Statute of Frauds does not require that that particular be expressed in writing.⁸⁶

5. Excuses for delay.

A greater degree of vigilance is required on the part of the vendor in perfecting his title to the property, when the purchaser is in possession of the premises, than is required when possession has not been changed.⁸⁷ A delay occasioned

⁸². *Paige v. McDonald*, 55 N. Y. 299; *Klingenstein v. Alexander*, 57 Misc. 236, 109 N. Y. Supp. 143; *Leinhardt v. Soloman*, 57 Misc. 238, 109 N. Y. Supp. 144; *Charlton v. Sheil*, 95 Misc. 321, 158 N. Y. Supp. 944.

⁸³. *Willis v. Dawson*, 34 Hun 492.

⁸⁴. *Schmidt v. Reed*, 132 N. Y. 108; *Kahn v. Chapin*, 152 N. Y. 305. See

also, *Blixt v. Ettona Realty Co.*, 133 App. Div. 499, 122 N. Y. Supp. 861.

⁸⁵. *Northrup v. Scott*, 85 Misc. 515, 148 N. Y. Supp. 846.

⁸⁶. *Wiswall v. McGown*, 2 Barb. 270, affirmed, 10 N. Y. 465.

⁸⁷. *More v. Smedburgh*, 8 Paige 600, affirmed, 26 Wend. 233.

by the conduct of one party will not prejudice the other party.⁸⁸ Relief may be granted where the delay was the result of the purchaser's mistake in marking the date on his calendar, where he was ready to perform within a few days and there had been no prejudicial change in the meantime.⁸⁹ One who has acquiesced in the delay cannot insist that the contract is thereby terminated.⁹⁰ A vendor who has permitted the purchaser to remain in possession of the premises after default and has received delayed payments from him, may be barred from claiming that the contract is forfeited.⁹¹ A forfeiture may be waived by partial payments by the vendee after the prescribed time, and the vendor cannot then stop suddenly short, and insist upon the forfeiture for the non-payment of the arrears remaining unpaid, without any previous notice of his intention to do so if the arrears are not paid.⁹² It is so inequitable to permit a vendor to have both the land and the partial payments made by the vendee, that the courts will avoid such a result, if it is reasonably possible.⁹³ If a vendee in possession of the premises desires to rescind the contract because the vendor has procured a conveyance within the time limited, he should do so promptly by surrendering the possession of the premises.⁹⁴

6. Extension of time for performance.

Although time is of the essence of the contract, the parties may by agreement establish a subsequent date for performance.⁹⁵ The adjourned date may be made of the essence of

88. *Begen v. Pettus*, 223 N. Y. 662.

89. *Shipman v. Cummins*, 19 N. Y. Supp. 974, 47 St. Rep. 416.

90. *Duffy v. O'Donovan*, 46 N. Y. 223; *Schroeppel v. Hopper*, 40 Barb. 425; *Williston v. Williston*, 41 Barb. 635; *Benson v. Tilton*, 24 How. Pr. 494, affirmed, 41 N. Y. 619; *Delavan v. Duncan*, 4 Hun 29; *Richmond v. Foote*, 3 Lans. 244.

91. *Murray v. Harbor, etc.*, Assn. 91 App. Div. 397, 86 N. Y. Supp. 799, affirmed on opinion below, 184 N. Y. 596; *Barnett v. Sussman*, 116 App. Div. 859, 102 N. Y. Supp. 287; *Voorhees v. De Meyer*, 2 Barb. 37, affirm-

ing, 3 Sandf. Ch. 614; *Harris v. Troup*, 8 Paige 423.

92. *Richmond v. Foote*, 3 Lans. 244; *Harris v. Troup*, 8 Paige 423.

93. *Murray v. Harbor, etc.*, Assn., 91 App. Div. 397, 86 N. Y. Supp. 799, affirmed on opinion below, 184 N. Y. 596.

94. *Schroeppel v. Hopper*, 40 Barb. 425.

95. *Delavan v. Duncan*, 4 Hun 29.

Question of fact.—If the evidence as to the extension of time is conflicting, an appellate court will not ordinarily disturb the finding made by the trial court. *Reede v. Schneider*, 47 How. Pr. 379, 3 T. & C. 104, 1 Hun 121.

the contract.⁹⁶ If, at the time an adjournment of closing of title is taken, one of the parties announces that the transaction must be consummated at the adjourned date, such time may then become of the essence, and a party then in default may be without remedy.⁹⁷

If the time for closing title has been indefinitely postponed, in order to put a party in default and thus avoid the contract, the other party generally must give notice that performance must be made at a specified time.⁹⁸ If no such notice is given, a party is not in default if he tenders performance within a reasonable time, there having arisen in the meantime no prejudicial change in the situation of the parties.⁹⁹

7. Place of performance.

If the contract mentions no place for performance and both parties reside within the State, the vendee cannot put the vendor in default without seeking him and offering to perform; and the vendor cannot put the vendee in default without seeking him and tendering the deed and demanding the purchase price.¹ An oral agreement as to the place of performance may be shown, although the contract was in writing.²

8. Variance between description in contract and in deed.

The description in a proffered deed should correspond to that contained in the contract of sale, at least to the extent of conveying the same premises. Where there is a dispute as to the boundary between the premises contracted to be conveyed by an executor and the adjoining premises belonging to the executor individually, and the executor, in an effort to settle the dispute in his own favor, tenders a deed to the purchaser describing the premises by metes and bounds, but not following the description in the contract, the purchaser may properly refuse to accept the deed.³ If

96. *Babcock v. Emrich*, 64 How. Pr. Div. 631, 127 N. Y. Supp. 470.
435.

97. *Klingenstein v. Alexander*, 57 Misc. 236, 109 N. Y. Supp. 143. See 601, 58 St. Rep. 756, 27 N. Y. Supp. 864.
also, *Leaird v. Smith*, 44 N. Y. 618.

98. *Scudder v. Lehman*, 142 App. Div. 631, 127 N. Y. Supp. 470.

99. *Scudder v. Lehman*, 142 App. Div. 631, 127 N. Y. Supp. 470.

1. *Leaird v. Smith*, 44 N. Y. 618.
2. *Grillenberger v. Spencer*, 7 Misc. 601, 58 St. Rep. 756, 27 N. Y. Supp. 864.
3. *Agan v. Barry*, 66 App. Div. 101, 72 N. Y. Supp. 667, affirmed without opinion, 175 N. Y. 521.

the contract refers to the premises as certain lot numbers the purchaser is entitled to have the description in the deed state such lot numbers, although the deed also describes the premises by metes and bounds.⁴ The dimensions of the lot as contained in the description may be merely a matter of identification, so that the purchaser will be required to accept a deed containing the correct dimensions.⁵

9. Title of vendor not marketable.

a. In general

Ordinarily, the seller is bound to furnish a "marketable" title to the premises he has agreed to sell.⁶ A promise to convey a good title is implied in an executory contract for the sale of lands.⁷ If unable to give such a title, the vendor is in default, and he is not entitled to the specific performance of the contract,⁸ although the purchaser may likewise

4. *Myrtle Realty Co. v. Kalter*, 131 App. Div. 281, 115 N. Y. Supp. 694.

5. *Von Barga v. Ginsberg*, 126 Misc. 702, 214 N. Y. Supp. 1, reversed, 218 App. Div. 545, 218 N. Y. Supp. 601, holding that the variation in dimensions was so substantial that the rule was inapplicable.

6. *Kilpatrick v. Barron*, 125 N. Y. 751; *Chesebro v. Moers*, 233 N. Y. 75.

"First class" title.—A provision in a contract that the title shall be "first class," means simply that the title shall be marketable. *Vought v. Williams*, 120 N. Y. 253.

"Defects."—A contract providing that the title shall be free from "defects" means only such valid and reasonable objections as will affect the marketability of the title. *Stanley v. Gannon*, 109 Misc. 611, 180 N. Y. Supp. 602.

Title to be passed by purchaser's attorney.—A provision in a contract that the title shall be passed upon by a lawyer or a conveyancer designated by the purchaser, does not make the decision of such person a condition precedent to the right of the vendor to enforce the performance of the

contract. *Vought v. Williams*, 120 N. Y. 253.

7. *Irving v. Campbell*, 121 N. Y. 353; *Drake v. Shiels*, 7 N. Y. Supp. 209.

8. *Gilbert v. Peteler*, 38 N. Y. 165; *Bensel v. Gray*, 80 N. Y. 517; *People v. Open Board of Stock Brokers Building Co.*, 92 N. Y. 98; *Fleming v. Burnham*, 100 N. Y. 1; *McPherson v. Schade*, 149 N. Y. 16; *Dyker Meadow Land & Imp. Co. v. Cook*, 159 N. Y. 6; *Downey v. Seib*, 185 N. Y. 427; *Chesebro v. Moers*, 233 N. Y. 75; *Bullard v. Bicknell*, 26 App. Div. 319, 49 N. Y. Supp. 666; *Fowler v. Manheimer*, 70 App. Div. 56, 75 N. Y. Supp. 17, affirmed without opinion, 178 N. Y. 581; *Kuntz v. Schnugg*, 99 App. Div. 191, 90 N. Y. Supp. 933; *Remsen v. Wingert*, 112 App. Div. 234, 98 N. Y. Supp. 388, affirmed without opinion, 188 N. Y. 632; *Goodrich v. Pratt*, 114 App. Div. 771, 100 N. Y. Supp. 187; *Celestial Realty Co. v. Childs*, 182 App. Div. 85, 169 N. Y. Supp. 597; *Imlach v. Seigel*, 199 App. Div. 343, 191 N. Y. Supp. 814; *Mathewson v. Geer*, 210 App. Div. 160, 205 N. Y. Supp. 451; *Simpson v. Kamos Re-*

be in default.⁹ On the other hand, if the purchaser is not in default, he is entitled to such relief as is proper under the circumstances.¹⁰ Of course, the purchaser may have contracted to take such title as the vendor possesses; and, in such a case, there is no issue as to the validity of the title, but such cases are rare.¹¹ Or, if the purchaser has agreed to take title subject to certain defects or restrictions, he cannot afterward claim these render the title unmarketable. It is the existence of defects, other than those contemplated by the parties, which, if they render the title unmarketable, justify the purchaser in refusing the title.¹²

b. When title of vendor unmarketable.

It is, of course, not the province of a book of this character to discuss in detail all the real and fancied defects which may be claimed to render a title unmarketable.¹³ A purchaser is entitled to a title which will enable him to hold the premises free from probable claim by another; a title, which if he wishes to sell, will be reasonably free from doubt.¹⁴ He cannot be compelled to take property, the pos-

alty Co., Inc., 223 App. Div. 98, 227 N. Y. Supp. 98; Warner v. Will, 5 Misc. 329, 25 N. Y. Supp. 749, 56 St. Rep. 55; Reydel v. Reydel, 10 Misc. 273, 31 N. Y. Supp. 1; Hatt v. Haganman, 12 Misc. 171, 33 N. Y. Supp. 5, 66 St. Rep. 506; Clark v. Merinsky, 122 Misc. 168, 202 N. Y. Supp. 273; Saphir v. Herhlihy, 131 Misc. 422, 226 N. Y. Supp. 255; Birdsall v. Waldron, 2 Edw. Ch. 315; Reede v. Schneider, 47 How. Pr. 379, 3 T. & C. 104, 1 Hun 121; Mayer v. McCune, 59 How. Pr. 78; Post v. Weil, 8 Hun 418; Howell v. Donegan, 74 Hun 410, 26 N. Y. Supp. 805; Bearns v. Mela, 10 N. Y. Supp. 429; Carpenter v. Carpenter, 10 N. Y. Supp. 486, 32 St. Rep. 354; Bates v. Delavan, 5 Paige 299; Winne v. Reynolds, 6 Paige 407; Dominick v. Michael, 4 Sandf. (6 Super. Ct.) 374.

9. Link Realty & Constr. Co. v. Public Constr. Co., 169 App. Div. 88, 153 N. Y. Supp. 1032, affirmed without opinion, 222 N. Y. 699.

10. Lese v. Lawson, 118 App. Div.

254, 103 N. Y. Supp. 303; Smith v. Browning, 171 App. Div. 278, 157 N. Y. Supp. 71; Roberts v. New York L. Ins. Co., 195 App. Div. 97, 186 N. Y. Supp. 422, affirmed, 233 N. Y. 639; Gilbert v. Peteler, 38 Barb. 488, affirmed, 38 N. Y. 165.

11. Pratt v. Clark, 118 App. Div. 633, 103 N. Y. Supp. 612, appeal dismissed, 196 N. Y. 502; Brown v. Haff, 5 Paige 235; Winne v. Reynolds, 6 Paige 407.

12. Broeck v. Livingston, 1 Johns. Ch. 357; Lehman v. Reiner, 126 Misc. 465, 214 N. Y. Supp. 483.

Oral evidence.—Where a written contract provides for a deed free from all incumbrances with one expressly specified exception, oral evidence of a further exception cannot be received. Lese v. Lamprecht, 196 N. Y. 32.

13. Title from Alien Property Custodian, sustained.—Miller v. Lautenburg, 239 N. Y. 132.

14. Moore v. Williams, 115 N. Y. 586; Vought v. Williams, 120 N. Y.

session of which he may be obliged to defend by litigation.¹⁵ *A fortiori*, he will not be obliged to take a deed where the property is in the possession of an adverse claimant, for whose removal ejectment will possibly be necessary.¹⁶ If there is defect in the record title which can be supplied only by resort to parol evidence, and the title may depend upon questions of fact, as a general rule, the purchaser will not be required to perform his contract.¹⁷ If the title may be fairly questioned, or is subject to a reasonable doubt, specific performance will be refused.¹⁸ On the other hand, it is

253; *Irving v. Campbell*, 121 N. Y. 333; *McPherson v. Schade*, 149 N. Y. 16; *Heller v. Cohen*, 154 N. Y. 299; *Dyker Meadow Land & Imp. Co. v. Cook*, 159 N. Y. 6; *Chesebro v. Moers*, 233 N. Y. 75; *Paolillo v. Faber*, 56 App. Div. 241, 67 N. Y. Supp. 638; *Downey v. Seib*, 102 App. Div. 317, 92 N. Y. Supp. 431, affirmed, 185 N. Y. 427; *Murphy v. Fox*, 128 App. Div. 534, 112 N. Y. Supp. 819; *Hatt v. Hagaman*, 12 Misc. 171, 33 N. Y. Supp. 5, 66 St. Rep. 506; *Sloane v. Martin*, 24 N. Y. Supp. 661. "A marketable title is one that is free from reasonable doubt. There is reasonable doubt when there is uncertainty as to some fact appearing in the course of its deduction, and the doubt must be such as affects the value of the land or will interfere with its sale. A purchaser is not to be compelled to take property the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and if he wishes to sell it, be reasonably sure that no flaw or doubt will arise to disturb its market value." *Vought v. Williams*, 120 N. Y. 253.

15. *McPherson v. Schade*, 149 N. Y. 16; *Heller v. Cohen*, 154 N. Y. 299; *Dyker Meadow Land & Imp. Co. v. Cook*, 159 N. Y. 6; *Brokaw v. Duffy*, 165 N. Y. 391; *Chesebro v. Moers*, 233 N. Y. 75; *Anderson v. Steinway & Sons*, 178 App. Div. 507, 165 N. Y. Supp. 608, affirmed, 221 N. Y. 639;

Hatt v. Hagaman, 12 Misc. 171, 33 N. Y. Supp. 5, 66 St. Rep. 506; *Fish v. Deady*, 127 Misc. 332, 215 N. Y. Supp. 374.

16. *Bullard v. Bicknell*, 26 App. Div. 319, 49 N. Y. Supp. 666.

Tenants in possession.—A vendor, who has contracted to give actual possession of lands on the day of the passing title, cannot compel specific performance if his tenants in possession refuse to vacate on that date. Equity will not compel a vendee, entitled to possession, to specifically perform, if in order to obtain possession she will be obliged to take the hazard of dispossessing tenants. *Buxbaum v. Devoe*, 123 App. Div. 653, 107 N. Y. Supp. 1053.

17. *Shriver v. Shriver*, 86 N. Y. 575; *Moore v. Williams*, 115 N. Y. 586; *Fleming v. Burnham*, 100 N. Y. 1; *Irving v. Campbell*, 121 N. Y. 353; *Dingley v. Bon*, 130 N. Y. 607; *Holly v. Hirsch*, 135 N. Y. 590; *McPherson v. Schade*, 149 N. Y. 16; *Heller v. Cohen*, 154 N. Y. 299; *Chesebro v. Moers*, 233 N. Y. 75.

18. *Vought v. Williams*, 120 N. Y. 253; *Kilpatrick v. Barron*, 125 N. Y. 751; *McPherson v. Schade*, 149 N. Y. 16; *Heller v. Cohen*, 154 N. Y. 299; *Downey v. Seib*, 185 N. Y. 427; *Fowler v. Manheimer*, 70 App. Div. 56, 75 N. Y. Supp. 17, affirmed without opinion, 178 N. Y. 581; *Salisbury v. Ryon*, 105 App. Div. 445, 94 N. Y. Supp. 352; *Davidson v. Jones*, 112 App. Div. 254,

not every defect in title which will relieve a purchaser. The defect must be of substantial character, from which the purchaser suffers or may suffer some injury. He is entitled to the substantial benefit of his contract, and to receive unimpaired what he is entitled to take thereby. But he can make no legal complaint of defects from which he suffers no injury and which do not diminish in quantity, quality, or value the thing contracted for.¹⁹

c. Title depending on questions of law.

If the validity of the title depends upon the interpretation to be given a deed, will or other written instrument, and all of the parties interested in the question are before

98 N. Y. Supp. 265; *Warner v. Will*, 5 Misc. 329, 25 N. Y. Supp. 749, 56 St. Rep. 55; *Hatt v. Hagaman*, 12 Misc. 171, 33 N. Y. Supp. 5, 66 St. Rep. 506; *Ferris v. Plummer*, 42 Hun 440; *Schween v. Greenberg*, 76 Hun, 354, 59 St. Rep. 134, 27 N. Y. Supp. 760; *Bearns v. Mela*, 10 N. Y. Supp. 429. "It has been often said that the purchaser is entitled to a marketable title. The title tendered need not in fact be bad in order to relieve him from his purchase, but it must either be defective in fact, or so clouded by apparent defects, either in the record or by proof outside of the record, that prudent men, knowing the facts, would hesitate to take it." *Greenblatt v. Hermann*, 144 N. Y. 13.

19. *Brookman v. Kurzman*, 94 N. Y. 272; *Hellreigel v. Manning*, 97 N. Y. 56; *Mead v. Martens*, 21 App. Div. 134, 47 N. Y. Supp. 299, affirmed without opinion, 162 N. Y. 626; *Sassertah v. Metzgar*, 30 Abb. N. C. 407, 27 N. Y. Supp. 959; *Schermerhorn v. Niblo*, 2 Bosw. (15 Super. Ct.) 161; *Ottinger v. Strasburger*, 33 Hun 466, affirmed, 102 N. Y. 692; *Walton v. Meeks*, 41 Hun 311, 3 St. Rep. 377, affirmed, 120 N. Y. 79; *Seligman v. Sonneborn*, 11 St. Rep. 305; *Heck v. Volz*, 14 St. Rep. 409. "A purchaser cannot justify his refusal to perform his contract by a mere captious objection to the title

tendered him; nor is it sufficient for him when the jurisdiction of an equity court is invoked to compel him to perform his contract, merely to raise a doubt as to the vendor's title. Before he can successfully resist performance of his contract on the ground of defect of title, there must be at least a reasonable doubt as to the vendor's title—such as affects its value, and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable. A defect in the record title may, under certain circumstances, furnish a defense to the purchaser. But there is no inflexible rule that a vendor must furnish a perfect record or paper title. It has frequently been held that defects in the record or paper title may be cured or removed by parol evidence." *Hellreigel v. Manning*, 97 N. Y. 56. "A vendee who refuses to take title upon the ground of defect therein, must point out the objection and give proof tending to establish it, or to create such a doubt in respect thereto as to render the title unmarketable. If the defect or doubt is disclosed on the face of the record title, he need go no further, but if it depends upon some extrinsic fact not disclosed by the record, he must show the fact which justifies his refusal to accept the title tendered." *Greenblatt v. Hermann*, 144 N. Y. 13.

the court, a determination may be had which sustain the validity of the title, and the purchaser may be compelled to accept the title.²⁰ But, if all of the persons having possible interests in the property are not parties to the action, relief is frequently denied, if the question of law involved is doubtful.²¹ This is particularly the position of the lower courts and of the Appellate Division,²² though cases may exist where the Appellate Division has deemed the question of law so free from doubt that performance may be required.²³ The Court of Appeals, however, by virtue of its supreme judicial authority can determine the question of law, and, although its decision is not *res adjudicata* as to persons not parties to the action, it is *stare decisis*, and after giving its determination of the question of law, it can decide that the title is free from doubt in a case where a lower court might well adhere to its opinion that there was a doubt.²⁴ The possibility that the Court of Appeals, at some time in the future when other parties are before it, will disregard its own precedent and decide the same question in a different way, is so remote that it should not be permitted to render the title unmarketable.²⁵ Earlier cases may be found, however, where the Court of Appeals has refused relief under such circumstances.²⁶

20. *Fleming v. Burnham*, 100 N. Y. 1; *Dyker Meadow Land & Imp. Co. v. Cook*, 159 N. Y. 6.

21. *Fleming v. Burnham*, 100 N. Y. 1; *Felix v. Deolin*, 90 App. Div. 103, 86 N. Y. Supp. 12, affirmed, 91 App. Div. 613, 88 N. Y. Supp. 1101; *Cook v. Sackett*, 110 App. Div. 322, 96 N. Y. Supp. 1085; *Remsen v. Wingert*, 112 App. Div. 234, 98 N. Y. Supp. 388, affirmed without opinion, 188 N. Y. 632; *McKean v. Hill*, 166 App. Div. 18, 151 N. Y. Supp. 689; *Imlach v. Seigel*, 199 App. Div. 343, 191 N. Y. Supp. 814; *Paret v. Kenealy*, 30 Hun 15; *Sloane v. Martin*, 24 N. Y. Supp. 661.

22. *Salisbury v. Ryon*, 105 App. Div. 445, 94 N. Y. Supp. 352; *Cromwell v. American Bible Society*, 202 App. Div. 625, 195 N. Y. Supp. 217; *Loria, Inc.*

v. Stanton Co., 115 Misc. 640, 190 N. Y. Supp. 131, reversed, 201 App. Div. 228, 194 N. Y. Supp. 270; *Fish v. Deady*, 127 Misc. 332, 215 N. Y. Supp. 374; *McGrane v. Kennedy*, 16 Daly 241, 10 N. Y. Supp. 119; *Sloane v. Martin*, 24 N. Y. Supp. 661.

23. *Davidson v. Jones*, 112 App. Div. 254, 98 N. Y. Supp. 265; *McArthur v. Weaver*, 129 App. Div. 743, 113 N. Y. Supp. 1095; *Hardenbergh v. McCarthy*, 130 App. Div. 538, 114 N. Y. Supp. 1073.

24. *Holly v. Hirsch*, 135 N. Y. 590; *Ebling v. Dreyer*, 149 N. Y. 460; Reformed P. D. Church v. Madison Abe. Bldg. Co., 214 N. Y. 268.

25. *Ebling v. Dreyer*, 149 N. Y. 460.

26. *Abbott v. James*, 111 N. Y. 673; *Kilpatrick v. Barron*, 125 N. Y. 751.

d. Outstanding incumbrances.

The existence of an incumbrance on the premises may justify the purchaser in refusing to accept the title, and may leave the vendor without remedy in specific performance.²⁷ Under most contracts of sale, however, the vendor will be permitted to satisfy the incumbrance out of the purchase money; and satisfaction prior to the law day is not essential.²⁸ The vendor will not be in default if at the time set for the closing of the title, he produces a satisfaction of the lien or if the lienor appears ready to satisfy the claim on payment thereof.²⁹ In fact, if time is not of the essence of the contract, the satisfaction of the incumbrance may be provided by the decree in the action.³⁰ An incumbrance which is created by the act or default of the purchaser is of no avail to him as a means of avoiding his contract.³¹

An undischarged mortgage may preclude the remedy,³² unless the purchaser has assumed the mortgage,³³ or unless the mortgage is so ancient that there is no reasonable doubt but that it has been paid;³⁴ or unless the equities of the parties as to the mortgage may be adjusted in the decree.³⁵

A mechanic's lien may ordinarily be paid out of the pur-

27. *Rose v. Adler*, 147 N. Y. Supp. 307, affirmed without opinion, 165 App. Div. 921, 150 N. Y. Supp. 1110; *Kmetz v. DeRonde*, 191 App. Div. 142, 181 N. Y. Supp. 94.

28. *Hinckley v. Smith*, 51 N. Y. 21; *Nicklas v. Keller*, 9 App. Div. 216, 41 N. Y. Supp. 172, 75 St. Rep. 620; *Pangburn v. Miles*, 10 Abb. N. C. 42; *Rinaldo v. Hausmann*, 52 How. Pr. 190; *Webster v. Kings County Trust Co.*, 80 Hun 420, 30 N. Y. Supp. 357, 62 St. Rep. 112, affirmed, 145 N. Y. 275; *Keating v. Gunther*, 10 N. Y. Supp. 734.

Water tax.—An objection that the property is subject to an unpaid water tax is disposed of by the vendor's offer to allow a deduction of the amount thereof from the purchase price. *Cogswell v. Boehm*, 5 N. Y. Supp. 67.

29. *Pangburn v. Miles*, 10 Abb. N. C. 42; *Rinaldo v. Hausmann*, 52 How. Pr. 190; *Webster v. Kings County*

Trust Co., 80 Hun 420, 30 N. Y. Supp. 357, 62 St. Rep. 112, affirmed, 145 N. Y. 275.

30. See, *infra*, IV-B-5, Payment or assumption of incumbrances.

31. *Van Bromer v. Shaffer*, 21 Week. Dig. 139.

32. *Harris v. Shorall*, 188 App. Div. 330, 177 N. Y. Supp. 214.

33. **Variance in terms of mortgage.**—Although by the contract of sale, the purchaser has assumed a mortgage payable in a certain manner, if the terms of payment as specified in the mortgage are more burdensome than those specified in the contract, the purchaser may decline to take the deed. *Ansorge v. Belfer*, 248 N. Y. 145; *Yokshas v. Damcovich*, 214 App. Div. 640, 213 N. Y. Supp. 68.

34. *Forsyth v. Leslie*, 74 App. Div. 517, 77 N. Y. Supp. 826.

35. See, *infra*, II-Y-9-n, Title marketable at time of trial.

chase price and hence will not in all cases preclude a decree. But, if the vendor fails or refuses to secure the satisfaction of the lien, he cannot insist that the purchaser take the title.³⁶ A local assessment against the premises will render the title unmarketable,³⁷ unless the proceeding in which it was made is void on its face.³⁸ The possible lien which creditors may have against the real estate of a decedent does not render the title unmarketable, in the absence of evidence, both of debts and an insufficiency of personal property.³⁹

An undischarged judgment may render the title unmarketable. A deed executed before the docketing of a judgment has priority over the judgment, although it is not recorded until after the docketing of the judgment; and, although there is a presumption that the deed was delivered at its date, the possibility that this presumption may be rebutted and that it may be shown that the deed was in fact delivered after the judgment was perfected, may render the title unmarketable.⁴⁰

e. *Lis pendens*.

Whether a pending action, as evidenced by a notice of pendency, renders the title unmarketable, depends on the sufficiency of the complaint. If the complaint states a cause of action affecting the title to the premises, a purchaser is not required to ascertain whether the allegations of the complaint can be sustained, and he may reject the title.⁴¹ He will not be required to purchase a lawsuit.⁴² On the other hand, if the complaint does not state a cause of action, the *lis pendens* is no incumbrance, and the purchaser may be required specifically to perform his contract obligations.⁴³ Or, if the notice of pendency was not filed until after the defendant in that action had conveyed the premises, or if no complaint is filed with the notice, the title is not unmar-

36. *Roberts v. New York L. Ins. Co.*, 195 App. Div. 97, 186 N. Y. Supp. 422, affirmed, 233 N. Y. 639.

37. *Dyker Meadow Land & Imp. Co. v. Cook*, 159 N. Y. 6.

38. *Dyker Meadow Land & Imp. Co. v. Cook*, 159 N. Y. 6.

39. *Moser v. Cochrane*, 107 N. Y. 35.

40. *Tausk v. Siry*, 110 Misc. 514, 180 N. Y. Supp. 439.

41. *Simon v. Vanderveer*, 153 N. Y. 377; *Murphy v. Fox*, 128 App. Div. 534, 112 N. Y. Supp. 819.

42. *Murphy v. Fox*, 128 App. Div. 534, 112 N. Y. Supp. 819.

43. *Strasbourg v. Hesu Realty Co.*,

ketable.⁴⁴ And it has been held that a *lis pendens* filed in an action to foreclose a mortgage which the purchaser agreed to assume, is not a sufficient objection to the title, in the absence of a tender and offer to perform by the purchaser.⁴⁵

f. Restrictive covenants.

Restrictive covenants, unknown to the purchaser when he entered into the contract, may furnish an adequate reason for his refusal to complete the purchase.⁴⁶ If the use of the premises is restricted, the owner cannot generally enforce the contract, unless the contract contains exceptions as to the restriction.⁴⁷ The fact that the restriction affects adjoining premises and hence may render the premises in question more valuable, does not affect the decision.⁴⁸ And the fact that the neighborhood may have been changed or that some other consideration may have arisen which will influence the courts to deny equitable relief for the enforcement of the covenant, does not render the title marketable and enable the vendor to compel a purchaser to accept the title, if there remains a remedy by way of damages for a violation.⁴⁹ If, however, the court finds that the restriction has terminated by act of the parties or otherwise, specific performance may be decreed.⁵⁰ Where the restriction affects several lots, a violation by one owner, does not constitute an incumbrance upon the property of an adjoining owner so as to render the title of the latter unmarketable.⁵¹

g. Zoning regulations.

Where a zoning regulation is passed after the execution of a contract of sale, the situation of the parties may be

Inc., 198 App. Div. 805, 191 N. Y. Supp. 133.

44. *Woodenbury v. Spier*, 122 App. Div. 396, 106 N. Y. Supp. 817.

45. *Garibaldi Realty & Constr. Co. v. Santangelo*, 164 App. Div. 513, 149 N. Y. Supp. 669, affirmed without opinion, 221 N. Y. 673.

46. *Wetmore v. Bruce*, 118 N. Y. 319; *Bull v. Burton*, 227 N. Y. 101; *Chesebro v. Moers*, 233 N. Y. 75; *Goodrich v. Pratt*, 114 App. Div. 771, 100 N. Y. Supp. 187; *Altmans v. McMillen*, 115 App. Div. 234, 100 N. Y. Supp. 970; *Link Realty & Constr. Co.*

v. Public Constr. Co., 169 App. Div. 88, 153 N. Y. Supp. 1032, affirmed without opinion, 222 N. Y. 699; *Cromwell v. American Bible Society*, 202 App. Div. 625, 195 N. Y. Supp. 217; *Bulkley v. Rouken Glen, Inc.*, 222 App. Div. 570, 226 N. Y. Supp. 544.

47. *Lehman v. Reiner*, 126 Misc. 465, 214 N. Y. Supp. 488.

48. *Goodrich v. Pratt*, 114 App. Div. 771, 100 N. Y. Supp. 187.

49. *Bull v. Burton*, 227 N. Y. 101.

50. *Obrock v. Crolly Co.*, 209 App. Div. 624, 205 N. Y. Supp. 231.

51. *Mead v. Martens*, 21 App. Div.

deemed to have been thereby changed so that specific performance of the contract will, as a matter of discretion, be denied.⁵² But, if the regulation antedates the contract, the purchaser will not be relieved merely because he had no knowledge of the regulation.⁵³ This latter situation would, however, be materially changed if the purchaser was misled, deceived or improperly influenced in making the contract.⁵⁴

h. Easements.

An easement affecting the use of the premises, where no exception relating thereto is inserted in the contract of sale may constitute an incumbrance on the servient estate which will justify the purchaser in refusing to accept the title thereto. An easement in "light and air" created by a deed in favor of an adjoining owner, may accomplish this result, for it may materially affect the use of the premises.⁵⁵ But the right of an adjoining proprietor to use a party-wall, is not a legal incumbrance; and a purchaser cannot refuse to complete his purchase on such ground.⁵⁶ An easement for poles and wires may create an unmarketable title, but not when the easement is in the street and the premises in question include no part of the street.⁵⁷

i. Encroachments.

A purchaser of real property with buildings thereon is entitled to assume that the buildings are upon the premises to be conveyed by the deed; and, as a general rule, if the buildings substantially encroach upon the premises of an adjoining owner, the purchaser cannot be compelled to complete the purchase.⁵⁸ A different conclusion may be reached

134, 47 N. Y. Supp. 299, affirmed without opinion, 162 N. Y. 626.

52. *Anderson v. Steinway & Sons*, 178 App. Div. 507, 165 N. Y. Supp. 608, affirmed, 221 N. Y. 639. And see, *supra*, II-W-8, Change in circumstances after execution of contract.

53. *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313.

54. *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313.

55. *Remsen v. Wingert*, 112 App. Div. 234, 98 N. Y. Supp. 388, affirmed without opinion, 188 N. Y. 632.

56. *Hendricks v. Stark*, 37 N. Y. 106; *Lenihan v. Ward*, 119 App. Div. 870, 103 N. Y. Supp. 1131; *Hefford v. Lichtman*, 116 Misc. 692, 190 N. Y. Supp. 554.

57. *Ansorge v. Belfer*, 248 N. Y. 145.

58. *Stokes v. Johnson*, 57 N. Y. 673; *McPherson v. Schade*, 149 N. Y. 16; *Spero v. Shultz*, 14 App. Div. 423, 43 N. Y. Supp. 1016, affirmed without opinion, 160 N. Y. 660; *Smyth v. McCool*, 22 Hun 595; *Drake v. Shiels*, 7 N. Y. Supp. 209.

where the encroachment is so trivial that it does not affect the value of the premises;⁵⁹ and this is especially true where the parties have apparently made a practical location of the dividing line.⁶⁰ Or, if the encroachment has existed for many years, so that in all reasonable probability, adverse possession would constitute a defense to an action to remove the encroachment, the title may be deemed marketable.⁶¹ Moreover, if the encroachment is less than six inches and the case comes within the limitation created by section 992 of the Civil Practice Act, the title may be marketable although the encroachment has existed but a comparatively short time.⁶²

A substantial encroachment upon the street line has much the same effect as an encroachment on adjoining premises.⁶³ If, however, the encroachment may be obviated with slight expense, or if it is so trivial that its very existence is doubtful, the purchaser may be compelled to perform.⁶⁴

j. Title from other than vendor.

Ordinarily the purchaser can insist upon a deed from the person assuming to sell the premises to him, and vendor does not fulfill his contract by tendering the deed of a third person who actually owns the premises.⁶⁵ This is clearly so, when the deed is to contain covenants of warranty, for the purchaser is entitled to receive the covenants of the vendor.⁶⁶ But, in the absence of any stipulation in the contract requiring covenants of warranty, the contract may be substantially performed by the tender of the deed of the actual owner, and specific performance may be granted.⁶⁷

k. Title by adverse possession.

If there exists a defect in the record title so that title to the premises is to be sustained, if at all, only by proof of

59. *Steinhardt v. Baker*, 20 Misc. 470, 46 N. Y. Supp. 707, affirmed, 25 App. Div. 197, 49 N. Y. Supp. 357, affirmed, 163 N. Y. 410.

60. *MacDonald v. Bach*, 51 App. Div. 549, 64 N. Y. Supp. 831.

61. See, *Poetzsch v. Mayer*, 115 Misc. 422, 189 N. Y. Supp. 695.

62. *McDonald v. Bach*, 29 Misc. 96, 60 N. Y. Supp. 557, affirmed, 51 App. Div. 549, 64 N. Y. Supp. 831.

63. *Sassertah v. Metzgar*, 30 Abb. N. C. 407, 27 N. Y. Supp. 959.

64. *Gelman v. Herrmann*, 188 Misc. 290, 193 N. Y. Supp. 174; *Sassertah v. Metzgar*, 30 Abb. N. C. 407, 27 N. Y. Supp. 959.

65. *Elterman v. Hyman*, 141 App. Div. 208, 126 N. Y. Supp. 6. See also, *Scott v. Thorp*, 4 Edw. Ch. 1.

66. *MacDonald v. Bach*, 51 App. Div. 549, 64 N. Y. Supp. 831.

67. *MacDonald v. Bach*, 51 App. Div. 549, 64 N. Y. Supp. 831.

adverse possession, the title, as a general rule, is unmarketable, and the vendor cannot compel the purchaser to accept a deed.⁶⁸ As has been noted above,⁶⁹ specific performance will not be decreed where the proffered title may require the purchaser to sustain his title by litigation, especially if oral evidence is necessary for the defense.

There are, however, cases where the adverse possession is so clear and has continued so long that there is no reasonable doubt of the validity of the title; and in such a case specific performance may be decreed.⁷⁰ Where the title by adverse possession is so clear that the court should direct a jury to find such title, the court will compel a specific performance of a contract where the vendor can give such a title.^{70a} A vendor who claims that his title is marketable by virtue of adverse possession is under the burden of establishing his claim.⁷¹ Mere undisturbed possession for a period of over twenty years will not establish title,⁷² for the period is extended when the persons entitled to assert their title are under disability.⁷³ Moreover, the circumstances must indicate that the possession is not by permission, for a mere permissive use never ripens into a title.⁷⁴ To compel the acceptance of a title based on adverse possession, more convincing proof must be furnished by the vendor than would be necessary for the defense of an action by the record owner.⁷⁵

A title by adverse possession will not satisfy a contract which requires the title to be shown by the records.⁷⁶

1. Opinions as to marketability.

The marketability of a tendered title is a question of law for the court, and the evidence of conveyancers or ab-

68. *Shriver v. Shriver*, 86 N. Y. 575; *Moore v. Williams*, 115 N. Y. 586; *Y. 692*; *Hennig v. Smith*, 151 N. Y. Supp. 444.

69a. *Abrams v. Rhoner*, 44 Hun 507.
71. *Blixt v. Ettona Realty Co.*, 138 App. Div. 499, 122 N. Y. Supp. 861.
72. *Heller v. Cohen*, 154 N. Y. 299.
73. *Shriver v. Shriver*, 86 N. Y. 575.
74. *Shriver v. Shriver*, 86 N. Y. 575.
75. *Carey v. Riley*, 121 Misc. 234, 201 N. Y. Supp. 151.

69. See, *supra*, II-Y-9-b, When title of vendor unmarketable.

70. *Moore v. Williams*, 115 N. Y. 586; *Shaw v. Davis*, 132 Misc. 890, 230 N. Y. Supp. 722; *Bohm v. Fay*, 18 Abb. N. C. 175; *Ottinger v. Strasburger*, 33 Hun 466, affirmed, 102 N.

76. *Hennig v. Smith*, 151 N. Y. Supp. 444.

strators of titles, that under certain circumstances a title is or is not regarded as marketable, is not admissible.⁷⁷

m. Waiver of objection to title.

A purchaser may waive an objection to a defect in a title so that such defect will not thereafter be deemed an obstacle to specific performance.⁷⁸ Thus, if the vendor offers to cure a certain objection and the purchaser thereupon states that it is unnecessary as he intends to rely upon another objection, there is a waiver of the earlier objection.⁷⁹ If, at the time for closing title, the purchaser makes unfounded objections to the title, he cannot thereafter make other objections which might have been obviated.⁸⁰ This doctrine, however, does not apply to defects which cannot be adjusted. Such defects can be urged whenever the vendor seeks to compel performance.⁸¹ A purchaser, although in default, cannot be compelled to take an unmarketable title.⁸²

n. Title marketable at time of trial.

In a suit by a vendor to compel the specific performance of a contract for the conveyance of real property, if time was not originally of the essence of the contract or has not subsequently become so through notice by the purchaser,⁸³ the vendor will be allowed to succeed, if his title is perfected at the time of the hearing or at the time of the making of the decree, although it was defective when the action was commenced.⁸⁴ In such a case performance is decreed as of

77. *Moser v. Cochrane*, 107 N. Y. 35.

78. *Webster v. Kings County Trust Co.*, 145 N. Y. 275; *Schifferdecker v. Busch*, 130 Misc. 625, 225 N. Y. Supp. 106.

Refusal to consent to adjournment for closing title, is not a waiver. *Ansorge v. Belfer*, 248 N. Y. 145.

79. *Cogswell v. Boehm*, 5 N. Y. Supp. 67.

80. *Hennig v. Smith*, 151 N. Y. Supp. 444.

81. *Link Realty & Constr. Co. v. Public Constr. Co.*, 169 App. Div. 88, 153 N. Y. Supp. 1032, affirmed without opinion, 222 N. Y. 699; *Hennig v. Smith*, 151 N. Y. Supp. 444.

82. *Link Realty & Constr. Co. v. Public Constr. Co.*, 169 App. Div. 88, 153 N. Y. Supp. 1032, affirmed without opinion, 222 N. Y. 699.

83. *Buxbaum v. Devoe*, 123 App. Div. 653, 107 N. Y. Supp. 1053. See, *supra*, II-Y-3, When time of essence.

84. *Jenkins v. Fahey*, 73 N. Y. 355; *Weinheimer v. Ross*, 205 N. Y. 518; *Baumeister v. Demuth*, 84 App. Div. 394, 82 N. Y. Supp. 831, affirmed without opinion, 178 N. Y. 630; *Pakas v. Clarke*, 136 App. Div. 492, 121 N. Y. Supp. 192, affirmed without opinion, 203 N. Y. 534; *Scudder v. Lehman*, 142 App. Div. 631, 127 N. Y. Supp. 470; *Strasbourg v. Hesu Realty Co., Inc.*,

the date of the judgment.⁸⁵ But, if circumstances exist which make it inequitable to compel the purchaser to take the title after such a delay, the remedy may be refused.⁸⁶ Or, if the vendor has been guilty of laches and has not done all that he should for the early curing of defects to the title, he may be denied relief.⁸⁷

Under the earlier Chancery practice, if a question was raised as to the sufficiency of the title, a reference was ordered; and, if the title was cured when the report of the master came before the Chancellor, specific performance was decreed.⁸⁸

10. Payment of purchase price.

Where the payment of the consideration is a condition precedent to a conveyance of the property, the purchaser cannot maintain an action of specific performance without making either the payment or a lawful tender thereof.⁸⁹ And,

198 App. Div. 805, 191 N. Y. Supp. 133; *H. & H. Corporation v. Broad Holding Corp.*, 204 App. Div. 569, 198 N. Y. Supp. 763; *Grillenberger v. Spencer*, 7 Misc. 601, 58 St. Rep. 756, 27 N. Y. Supp. 864; *Weinheimer v. Ross*, 80 Misc. 269, 141 N. Y. Supp. 55, modified, 162 App. Div. 933, 148 N. Y. Supp. 1150, affirmed, 214 N. Y. 630; *Loria, Inc. v. Stanton Co.*, 115 Misc. 640, 190 N. Y. Supp. 131, reversed on other grounds, 201 App. Div. 228, 194 N. Y. Supp. 270; *Pangburn v. Miles*, 10 Abb. N. C. 42; *Viele v. Troy & Boston R. Co.*, 21 Barb. 381, affirmed, 20 N. Y. 184; *Seymour v. Delancy*, 3 Cow. 445, reversing, 6 Johns. Ch. 222; *Clute v. Robinson*, 2 Johns. 595; *Brown v. Haff*, 5 Paige 235; *Baldwin v. Salter*, 8 Paige 473. See also, *Reiners v. Niederstein*, 55 App. Div. 80, 67 N. Y. Supp. 41. "The respondent now contends that if the plaintiff's title was not good at the time fixed for performance he is under no obligation to complete the purchase, even though the title has been perfected since. In an action at law that would be true; but it is the practice in equity to require specific performance if the title is good at the

time of the trial, even though defective at the time fixed for the performance of the contract where the vendor has, upon discovering defects, exercised diligence in remedying the same, if there has been no change in the circumstances or position of the parties by which performance will become inequitable, or will be to the substantial prejudice of either party, or where nothing has occurred to create an estoppel." *Baumeister v. Demuth*, 84 App. Div. 394, 82 N. Y. Supp. 831, affirmed without opinion, 178 N. Y. 630.

85. *Pakas v. Clarke*, 136 App. Div. 492, 121 N. Y. Supp. 192, affirmed without opinion, 203 N. Y. 534.

86. *Pakas v. Clarke*, 136 App. Div. 492, 121 N. Y. Supp. 192, affirmed without opinion, 203 N. Y. 534; *Seymour v. Delancy*, 3 Cow. 445, reversing, 6 Johns. Ch. 222.

87. *Begen v. Pettus*, 144 App. Div. 476, 129 N. Y. Supp. 218.

88. *Clute v. Robinson*, 2 Johns. 595; *Garden City, etc., Church v. Mott*, 7 Paige 77; *Baldwin v. Salter*, 8 Paige 473.

89. *Wright v. Delafield*, 23 Barb.

if time is of the essence of the contract, a failure of the vendee to make or tender payment on the time set for the closing of title, may leave him without remedy.⁹⁰ If the obligation of the purchaser is to pay a certain sum of money and also assume a mortgage in a certain amount, and he discovers that the mortgage is larger than was contemplated, a tender of a correspondingly lesser sum of money may be a substantial compliance which will entitle him to relief.⁹¹

11. Title insurance .

If the contract contains a stipulation that the vendor shall furnish title insurance, in the absence of such insurance, he is in default, and he cannot compel the purchaser specifically to perform the contract.⁹² A complaint in an action by a vendor is not defective because it does not allege that the title has been approved by a title company, where the contract requires merely that the purchaser shall have the right to refuse the title if he finds that a title company will not approve the title. In such a case the approval is not a condition precedent to recovery, but is a matter of defense to be shown by the defendant.⁹³

12. Notice to vendor of defect in title or deed.

If the vendor is unaware of any defect in his title, a purchaser, after a discovery of an apparent defect, should give the vendor notice thereof previous to the day of closing, in order that the vendor may have a reasonable opportunity to perfect his title.⁹⁴ Unless time is strictly of the essence of the contract or the defect in the title is one which cannot be remedied, the seller will be allowed an opportunity of curing the defect.⁹⁵ Good faith requires the giving of such a notice, and a court of equity will attempt to avoid any forfeiture which might arise from a surprise of this character and to afford the vendor proper relief.

498, reversed on other grounds, 25 N. Y. 266; *Wheeler v. Wheeler*, 2 N. Y. Supp. 496; *National Oleo Meter Co. v. Jackson*, 3 N. Y. Supp. 826, 21 St. Rep. 458.

90. *Kane Co. v. Jaretzki*, 119 Misc. 419, 196 N. Y. Supp. 791.

91. *Klaweiter v. Hubner*, 68 Hun 338, 22 N. Y. Supp. 815.

92. *Drake v. Gaffney*, 183 App. Div. 577, 171 N. Y. Supp. 131.

93. *Downs v. Lehman*, 123 App. Div. 11, 107 N. Y. Supp. 329.

94. *More v. Smedburgh*, 8 Paige 600, affirmed, 26 Wend. 238; *Keating v. Gunther*, 10 N. Y. Supp. 734.

95. *Eppig v. Gruhn*, 94 Misc. 443, 152 N. Y. Supp. 549.

13. Refusal to accept deed.

If the purchaser without legal reason refuses to accept the deed, as a general rule, he is without remedy.⁹⁶ Thus, if he refuses to accept the deed on the ground that the title was unmarketable, and the court decides to the contrary, he is without remedy either to recover a deposit made by him or to maintain an action of specific performance.⁹⁷ This would clearly be so in an action at law to recover the deposit, but a court of equity seeks to avoid a forfeiture of the deposit. Hence authorities may be found where a purchaser has been allowed to maintain an action of specific performance, although he declined to accept the deed, it appearing that there was some justification for his refusal and the circumstances indicating that the parties did not consider the contract terminated.⁹⁸

14. Tender of performance.

The necessity of a tender of performance by the plaintiff before the commencement of suit for specific performance depends upon the circumstances. If time is of the essence of the contract, as a general rule, the plaintiff must appear on the law day and tender performance of the acts to be done by him. If in default he is without remedy.⁹⁹ But, if neither party performs or offers to perform on the day set for the consummation of the contract, either may claim specific performance, making offer of performance in his complaint; and the failure to make a tender before the commencement of the suit affects only the question of costs.¹ A demand on the defendant for performance is not generally necessary, except as it may have a bearing on the discretion of the court in awarding costs.² If a demand is necessary, a demand which is conditional or is accompanied by a claim to which the demandant is not entitled is not a sufficient

96. *Paige v. McDonald*, 55 N. Y. 299; *Woodenbury v. Spier*, 122 App. Div. 396, 106 N. Y. Supp. 817.

97. *Steinhardt v. Baker*, 163 N. Y. 411; *Whalen v. Stuart*, 194 N. Y. 495; *Fox v. Cox*, 201 N. Y. 189; *Steinhardt v. Baker*, 20 Misc. 470, 46 N. Y. Supp. 707, affirmed, 25 App. Div. 197, 49 N. Y. Supp. 357, affirmed, 163 N. Y. 410.

98. *Kahn v. Chapin*, 152 N. Y. 305; *Liebman v. Hall*, 110 Misc. 365, 180 N. Y. Supp. 514.

99. *Wells v. Smith*, 7 Paige 22.

1. *Stevenson v. Maxwell*, 2 N. Y. 408; *Murray v. Harbor, etc., Assn.*, 91 App. Div. 397, 86 N. Y. Supp. 799, affirmed on opinion below, 184 N. Y. 596; *Andrews v. Davis*, 5 St. Rep. 859.

2. *Bruce v. Wilson*, 25 N. Y. 194.

demand.³ If, however, the contract contains clauses providing for the performance of mutually dependent acts, and time is not of the essence of the contract, an actual tender in advance of suit is not necessary.

In an action for specific performance of a covenant of renewal, the plaintiff is not bound to show performance of a simple covenant to pay rent and taxes, or tender of any sums due thereunder. It is enough if the complaint contains an offer to perform and the decree provides for such performance as a condition.⁴

If the acts to be performed are not mutually dependent, but the acts to be performed by one are a condition precedent to action by the other party, actual performance or tender of performance of the condition precedent must be shown in order to justify relief.⁵

In an action in equity by a vendee in an executory contract for the sale of lands, no proof of a demand or tender of performance, on his part, before instituting suit for a specific performance is necessary, but an offer to perform, made in the complaint, and ability to perform at the time of the decree, are sufficient.⁶

In an action by a vendor to enforce an alleged equitable lien for unpaid purchase money under a contract for the sale of lands, it is no defense that a tender of a deed was not made by plaintiff before suit brought. The action is in effect an equitable one to enforce the contract, and in such case a tender is not required.⁷ But an action to foreclose a lien for the purchase money under a contract for the sale of land, cannot be maintained by the representatives of a deceased vendor where it is not alleged or shown that they have tendered, or are willing, ready and able to give, a deed; at least unless the person taking the legal title to the premises, either as heir or devisee, is made a party so as to be bound by the judgment.⁸

3. *Garibaldi Realty & Constr. Co. v. Santangelo*, 164 App. Div. 513, 149 N. Y. Supp. 669, affirmed without opinion, 221 N. Y. 673; *Palmer v. Hudson Valley Ry. Co.*, 134 App. Div. 42, 113 N. Y. Supp. 710.

4. *Crosby v. Moses*, 16 Jones & S. (48 Super. Ct.) 146, modified, 92 N. Y. 634.

5. *Leaird v. Smith*, 44 N. Y. 618;

Weintraub v. F. M. B. Realty Co., Inc., 196 App. Div. 525, 187 N. Y. Supp. 904; *Van Zandt v. Mayor, etc., of N. Y.*, 8 Bosw. (21 Super. Ct.) 375; *National Oleo Meter Co. v. Jackson*, 3 N. Y. Supp. 826, 21 St. Rep. 458.

6. *McCotter v. Lawrence*, 4 Hun 107, 6 T. & C. 392.

7. *Freeson v. Bissell*, 63 N. Y. 168.

8. *Thomson v. Smith*, 63 N. Y. 301.

In no case is a tender necessary where it is apparent that it would be an idle ceremony.⁹ Thus, if the defendant has repudiated the contract, it is unnecessary for the plaintiff to make a perfunctory tender.¹⁰ Or, if one of the parties at the time of the closing of the title interposes an unfounded claim which is not withdrawn or acceded to, the other party is excused from making a tender.¹¹ So, too, a tender by a purchaser is not necessary, if it is obvious that the vendor is unable to convey a marketable title to the premises.¹² But, if the objections to the title are such as may be easily cured, the vendor is not in default until the purchaser has offered to perform.¹³ And after the objections have been cured, the purchaser is not in default until the deed conveying the perfected title is tendered.¹⁴

Z. Default of defendant.

Ordinarily, unless a defendant is in default, there is no necessity for a suit, and none can be maintained.¹⁵ But a purchaser may maintain the action, though the time of performance by the vendor has not arrived, where the vendor has committed an anticipatory breach of the contract by refusing to accept a tender of the purchase money and repudiating the contract.¹⁶

Though the defendant is in default, the plaintiff cannot

9. *Kerr v. Purdy*, 50 Barb. 24.

10. *Crary v. Smith*, 2 N. Y. 60; *Baumann v. Pinckney*, 118 N. Y. 604, reversing, 14 Daly 241; *Farley v. Secor*, 167 App. Div. 80, 152 N. Y. Supp. 787; *Westervelt v. Matheson*, Hoff. Ch. 36; *Wheeler v. Crosby*, 20 Hun 140.

11. *Selleck v. Tallman*, 87 N. Y. 106.

12. *Delevan v. Duncan*, 49 N. Y. 485; *Lese v. Lawson*, 118 App. Div. 254, 103 N. Y. Supp. 303; *Kerr v. Purdy*, 50 Barb. 24. See also, *Schaefer v. Thompson*, 237 N. Y. 55.

13. *Garibaldi Realty & Constr. Co. v. Santangelo*, 164 App. Div. 513, 149 N. Y. Supp. 669, affirmed without opinion, 221 N. Y. 673.

14. *Pakas v. Clarke*, 136 App. Div. 492, 121 N. Y. Supp. 192, affirmed without opinion, 203 N. Y. 534.

15. *Dowdney v. McCullom*, 59 N. Y. 367.

16. *Corney v. Kline Bldg. & Constr. Co.*, 191 App. Div. 793, 132 N. Y. Supp. 15, wherein it was said: "If the vendor in a contract for the sale of land refuses to recognize the validity of the contract, no reason is perceived why the vendee should by delay take the risk of the complications which would result if the vendor should sell to another. A court of equity can always mould its relief so that the contract will be enforced as made, although the action is brought, or even tried, before the date fixed for closing. There is a difference in principle between an action for damages on the theory that the contract is ended by the breach of the defendant, and a suit in equity based on the theory

succeed unless he is willing and able to perform the covenants to be performed by him.¹⁷ Thus, the mere fact that the purchaser is in default will not justify a decree of specific performance against him, where the vendor does not have a marketable title to the premises.¹⁸

AA. Premises of infants or incompetents.

1. Civil Practice Act, § 1384. Jurisdiction of supreme court over contracts of incompetents.

The supreme court shall have authority to decree and compel the specific performance of any bargain, contract or agreement which may have been made by any idiot, lunatic or habitual drunkard, while such person was capable to contract, and of any contract in relation to lands made by the ancestor of such person from whom such person inherits or takes as devisee or otherwise; and to direct the committee of such person to do and execute all necessary conveyances and acts for that purpose; and in case the person entitled to such conveyance is the committee of such incompetent person, the said court, upon the petition of such committee, may appoint some suitable and proper person to execute the said conveyance in the name of such incompetent person, upon payment by the vendee of any sum remaining due to such person upon said contract, or upon the fulfillment of the contract on the part of the party who contracted with the person represented by said committee.

2. Civil Practice Act, § 1385. Action to compel conveyance.

In either of the following cases, an action may be maintained against an infant, or a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness, to procure a judgment directing a conveyance of real property or of an interest in real property:

1. Where the infant or incompetent person is seized or possessed of the real property, or interest in real property, by way of mortgage, or only in trust for another.

2. Where a valid contract for the sale or conveyance of the real property or interest in real property has been made, but a conveyance thereof cannot be made by reason of the infancy or incompetency of the person in whom the title is vested.

that the contract continues in force. The right to resort to equity to protect and enforce the contract before the time for performance is recognized in both the cases cited by the appellant, where an action for damages for an anticipatory breach of a contract of life insurance was denied. (*Langan v. Supreme Council Am. L. of H.*, 174 N. Y. 266; *Kelly v. Security Mutual Life Ins. Co.*, supra.) The

authorities amply sustain the doctrine in its application to an action for specific performance of a contract for the sale of real property."

17. *Haight v. Child*, 34 Barb. 186.

18. *Hinckley v. Smith*, 51 N. Y. 21; *Link Realty & Constr. Co. v. Public Constr. Co.*, 169 App. Div. 38, 153 N. Y. Supp. 1032, affirmed without opinion, 222 N. Y. 699.

3. Civil Practice Act, § 1386. Who may maintain action.

An action may be maintained, in a case specified in the last section, by a person entitled to the conveyance; and, also, in a case specified in subdivision second of that section, by the executor or administrator of the person who made the contract, or of a person who died seized or possessed of the real property or interest in real property, or by an heir or devisee of either of those persons, to whom the real property has descended or was devised. The action may be maintained by the committee of the lunatic or other incompetent person; but in that case the court must appoint a special guardian for the incompetent person as required by law where an infant is defendant, and the proceedings are the same as in a like action against an infant.

4. Civil Practice Act, § 1387. Judgment; effect thereof.

A judgment directing such conveyance shall not be rendered, unless the court, after hearing the parties, is satisfied that the conveyance ought to be made. Upon rendering final judgment to that effect, the court has power to direct the guardian of the infant's property, or the committee of the property of the lunatic or other incompetent person, or a special guardian appointed in the action, to execute any conveyance, or to do any other act, which is necessary in order to carry the judgment into effect.

ARTICLE III.**PROCEDURE.****A. Parties to action.****1. Plaintiffs generally.**

An action of specific performance is to be brought by some party to the contract or some one succeeding to his interest, or in some cases by one for whose benefit the contract was made.¹⁹ A court of equity will not enforce the contract in favor of a mere volunteer, for whose benefit the contract was not made, and who was neither a party nor a privy to it.²⁰ If two or more persons are jointly interested in the enforcement in the contract, all should be joined as plaintiffs,²¹ though one refusing so to join may be made a party defendant.²²

Where the question involved is one of common or general interest to many persons, or the persons who might have been made plaintiffs are very numerous, one or more may

19. See, *supra*, II-N-4, Contracts for disposition of property of deceased. Parties to contract.

20. *Beardsley Scythe Co. v. Foster*, 36 N. Y. 561.

21. *Spier v. Robinson*, 9 How. Pr. 325; *McCotter v. Lawrence*, 4 Hun 107, 6 T. & C. 392.

22. *Civ. Prac. Act*, § 194.

sue for the benefit of all.²³ This is permissible in an action to maintain the rights of corporate bondholders.²⁴

The fact that the signer of the contract describes himself as executor, does not necessarily require that the action be brought by him as executor. The reference to his position may be *descriptio personae*, and if he is individually interested the action may be brought individually.²⁵

In case a trustee refuses to bring the action, a beneficiary is, in some cases, entitled to maintain the suit in his own name.²⁶ Or, if a corporation refuses to bring an action, a stockholder may be entitled to maintain a representative action.²⁷

If the obligation sought to be enforced is the performance of a public duty imposed for the public benefit, it is said that no one individual can maintain the action.²⁸

2. Defendants generally.

All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities.³⁰ It is not necessary that each defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the court may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.³¹ If the contract is signed by several parties jointly, all should be joined as defendants.³²

In an equitable action, the plaintiff may bring in as defendants persons who are proper, though not necessary, parties.³³

23. Civ. Prac. Act, § 195.

24. O'Beirne v. Bullis, 80 Hun 570, 30 N. Y. Supp. 538, 62 St. Rep. 583, affirmed, 151 N. Y. 372.

25. Clepton v. Tunnard, 119 App. Div. 709, 104 N. Y. Supp. 665.

26. O'Beirne v. Allegheny & Kinzna R. Co., 151 N. Y. 372.

27. See, Fiero on Particular Actions and Proceedings, vol. 1, p. 713.

28. Getty v. Hudson River R. Co., 21 Barb. 617.

30. Civ. Prac. Act, § 211.

31. Civ. Prac. Act, § 212. And see, International Paper Co. v. Hudson River Power Co., 92 App. Div. 56, 86 N. Y. Supp. 736.

32. Powell v. Finch, 5 Duer, 666.

33. Standard Fashion Co. v. Siegel-Cooper Co., 157 N. Y. 60; East River

A decree directing the specific performance of an obligation cannot be made unless all the parties in interest are before the court.³⁴ In case of a transfer of interest, the successor is a necessary party for the granting of specific performance;³⁵ though, in his absence, alternative relief as by way of damages, may be granted in some cases. If the premises involved were transferred before the commencement of the action, specific performance cannot be granted unless the grantee is a party,³⁶ but ordinarily the grantor is not a necessary party.³⁷

Under section 193 of the Civil Practice Act, a person interested in the action may be allowed to intervene. It is not necessary under such section that the third party shall have rights in the subject-matter of the action or in the real estate that is to be affected by the judgment in the action superior to the plaintiff, but it is sufficient if such party is necessary to a complete determination of the controversy or has an interest in real property the title to which may in any manner be affected by the judgment.³⁸ The holder of a contract to purchase the property, made subsequent to the contract involved in the suit, should be allowed to come in as a party defendant.³⁹

An action of specific performance cannot be maintained against the State; the remedy, if any, is an action in the Court of Claims. This immunity extends to an action against the Loan Commissioners of the State.⁴⁰ And specific performance of an executory contract should not be decreed against a municipality, if the contract involves the exercise of legislative power.⁴¹

& Astoria Land Co. v. Kindred, 128 App. Div. 146, 112 N. Y. Supp. 540; Colorado & S. R. Co. v. Blair, 81 Misc. 654, 143 N. Y. Supp. 510, affirmed, 214 N. Y. 497.

34. International Paper Co. v. Hudson River Water Power Co., 92 App. Div. 56, 86 N. Y. Supp. 736; Blank v. La Montague, etc., Co., 123 Misc. 238, 205 N. Y. Supp. 45; Miller v. Bear, 3 Paige 466.

35. Mowbray v. Dieckman, 9 App. Div. 120, 41 N. Y. Supp. 82, 75 St. Rep. 543.

36. Mowbray v. Dieckman, 9 App.

Div. 120, 41 N. Y. Supp. 82, 75 St. Rep. 543. And see, *infra*, III-A-6, Grantee.

37. Miller v. Bear, 3 Paige 466.

38. Mandel v. Guardian Holding Co., Inc., 192 App. Div. 390, 182 N. Y. Supp. 686.

39. Mandel v. Guardian Holding Co., Inc., 192 App. Div. 390, 182 N. Y. Supp. 686.

40. Switzer v. Commissioners, 134 App. Div. 487, 119 N. Y. Supp. 383.

41. Bergen Beach Land Corp. v. City of New York, 113 Misc. 491, 185 N. Y. Supp. 177.

3. Personal representative of vendor.

Where a deceased vendor has failed to perform his contract, and the purchaser has fully performed, the action may be brought against his heirs or devisees,⁴² and, in such a case, the administrator of the deceased is frequently not a necessary party.⁴³ He may, however, be a proper party; and under many circumstances may be a necessary party, as, for example, when the purchaser is claiming damages,⁴⁴ or where there remains obligations to be performed by the purchaser which will accrue to the estate of the deceased.⁴⁵ Where one claims that a deceased has breached his agreement to leave to him by will his entire estate, the heirs and next of kin or legatees of the deceased are necessary parties, but it has been said that the administrator of the deceased is not a necessary party.⁴⁶

The executor of the vendor should not be a sole party defendant, where the will contains no devise of lands to the executor and does not direct any equitable conversion of the premises into personalty.⁴⁷ But, if the will contains a power of sale, it is thought that the executor may be made a defendant, without joining the devisees.⁴⁸ In case of the death of one of several executors, the action does not abate, but may be continued against the survivors.⁴⁹

The administrator of a deceased vendor is a proper party to enforce the payment of the contract.⁵⁰ Where the vendor dies during the pendency of an action by him, his executor or personal representative may revive the action, without bringing in the heirs of the deceased.⁵¹

4. Personal representative of vendee.

As the interest of an executory vendee is real estate which on his death descends as such to his heirs,⁵² they are proper

42. See, *infra*, III-A-5, Heirs, devisees.

43. *Rhoades v. Schwartz*, 41 Misc. 648, 85 N. Y. Supp. 229; *Colby v. Colby*, 81 Hun 221, 24 Civ. Proc. 148, 30 N. Y. Supp. 677, 62 St. Rep. 631.

44. *Colby v. Colby*, 81 Hun 221, 24 Civ. Proc. 148, 30 N. Y. Supp. 677, 62 St. Rep. 631.

45. *Potter v. Ellice*, 48 N. Y. 321; *Schroeppel v. Hopper*, 40 Barb. 425.

46. *Williams v. Williams*, 25 Abb. N. C. 217.

47. *Sherwood v. Harbeck*, 13 App. Div. 133, 42 N. Y. Supp. 1045.

48. *Leonard v. Schnarir*, 119 Misc. 200, 196 N. Y. Supp. 173; *Patterson v. Copeland*, 52 How. Pr. 460.

49. *Patterson v. Copeland*, 52 How. Pr. 460.

50. *Schroeppel v. Hopper*, 40 Barb. 425.

51. *Daniels v. Brodie*, 3 Edw. Ch. 275.

52. See, *supra*, I-D, Title of Parties to executory contract.

plaintiffs to enforce the contract.⁵³ Or the action may properly be brought by an executor of the deceased, who will take the conveyance for the benefit of those entitled to the property under the will.⁵⁴ Especially is this so, when damages for a breach of the contract are sought.⁵⁵ Leases for years are deemed part of the personal estate of the tenant, and pass to his personal representative, and covenants for a renewal thereof are to be enforced by him rather than by the heirs or devisees.⁵⁶ Likewise, it is thought that an option in a lease for the purchase of the premises, is to be enforced by the representative of the tenant.⁵⁷

5. Heirs, devisees.

The heirs of a deceased vendor, or in case of a testamentary disposition of his property, his devisees, are generally necessary defendants in an action to compel the specific performance of a contract made by such vendor in his lifetime.⁵⁸ Thus, in an action to enforce an agreement to leave property by will, the heirs or next of kin are necessary parties.⁵⁹ In any event, the heirs or devisees are generally proper parties.⁶⁰ Even when there is a will, the heirs may be made parties, if they are claiming that the will is void.⁶¹ If, however, the will devises the property to trustees for specific purposes, the beneficiaries are not necessary parties.⁶² Nor are the heirs necessary parties where they have conveyed their interests to the administrator of the estate to enable the latter to enforce the contract.⁶³

53. See the following paragraph.

54. *Baker v. Struck*, 130 Misc. 62, 223 N. Y. Supp. 613. *Contra*, *Buck v. Buck*, 11 Paige 170.

55. *Buck v. Buck*, 11 Paige 170.

56. *Schmitt v. Stoss*, 207 N. Y. 731.

57. *Walker v. Bradley*, 89 Misc. 516, 153 N. Y. Supp. 686.

58. *Hill v. Ressegien*, 17 Barb. 162; *Traphagen v. Traphagen*, 40 Barb. 537; *Colby v. Colby*, 81 Hun 221, 24 Civ. Proc. 148, 30 N. Y. Supp. 677, 62 St. Rep. 631.

Infant heir.—Notwithstanding his minority, an infant heir may be compelled to convey his interest in the premises though he will not be obliged to enter into personal covenants. *Hill v. Ressengrieu*, 17 Barb. 162.

Heirs of purchaser.—In an action by the executor of a deceased purchaser, his devisees should be parties. *Baker v. Struck*, 130 Misc. 62, 223 N. Y. Supp. 613.

59. *Rhoades v. Schwartz*, 41 Misc. 648, 85 N. Y. Supp. 229; *Williams v. Williams*, 25 Abb. N. C. 217.

60. *Sherwood v. Harbeck*, 13 App. Div. 133, 42 N. Y. Supp. 1045; *Champion v. Brown*, 6 Johns. Ch. 393.

61. *Heath v. Heath*, 18 Misc. 521, 42 N. Y. Supp. 1087, 76 St. Rep. 1087.

62. *Hald v. Claffy*, 131 App. Div. 251, 115 N. Y. Supp. 561.

63. *Schroeppel v. Hopper*, 40 Barb. 425.

In the absence of a will, the title of an executory vendee descends to the heirs of the vendee; and they are proper parties plaintiff to enforce the contract;⁶⁴ or, in case of a will, the contract may be enforced by the devisees.⁶⁵ But the heirs or devisees are not proper parties to maintain an action for the recovery of damages for breach of the contract, for such an action is vested in the personal representative.⁶⁶

Where the executors of an owner of real estate have a mandatory power of sale, a contract made by them for the conveyance of the real estate, may be enforced by them without joining the beneficiaries.⁶⁷

6. Grantee

A conveyance of the premises by the contract vendor does not necessarily deprive the purchaser of his remedy;⁶⁸ though in some cases the impossibility of compelling a specific performance will render that remedy unavailing.⁶⁹ The grantee is a proper party to the action;⁷⁰ and is a necessary party when the conveyance of the premises, rather than an allowance of damages, is desired.⁷¹ It is desirable practice to make both the grantor and the grantee defendants and to ask, in the event that specific performance is impossible that damages against the grantor be awarded. The fact that such damages cannot be allowed as against the grantee does not affect the propriety of joining him as a defendant.⁷²

A grantee with actual knowledge of the outstanding contract of sale takes subject thereto and he is a proper defendant from whom conveyance may be compelled.⁷³ This

64. *Champion v. Brown*, 6 Johns. Ch. 398; *Williams v. Kearney*, 6 St. Rep. 560.

65. *Buck v. Buck*, 11 Paige 170.

66. *Van Zandt v. Mayor, etc.*, of N. Y., 8 Bosw. (21 Super. Ct.) 375.

67. *Strauss v. Bendheim*, 162 N. Y. 469.

68. An oral contract, void as against the grantor, is void as against the grantee. *Brustman v. Motrie*, 118 App. Div. 395, 103 N. Y. Supp. 541.

69. See, *supra*, II-V, Impossibility of performance.

70. *Mowbray v. Dieckman*, 9 App. Div. 120, 41 N. Y. Supp. 82, 75 St. Rep. 543.

71. *Mowbray v. Dieckman*, 9 App. Div. 120, 41 N. Y. Supp. 82, 75 St. Rep. 543; *Jurgesen v. Morris*, 194 App. Div. 92, 185 N. Y. Supp. 386; *Fullerton v. McCurdy*, 4 Lans. 132; *Kantrowitz v. Rothweiler*, 16 St. Rep. 297.

72. *Mowbray v. Dieckman*, 9 App. Div. 120, 41 N. Y. Supp. 82, 75 St. Rep. 543.

73. *Laverty v. Moore*, 33 N. Y. 658; *Duffy v. O'Donovan*, 46 N. Y. 223;

is true though the grantee is an infant.⁷⁴ Equity is vigilant to detect frauds; and, if it appears that the conveyance was collusively made for the purpose of avoiding the effect of the contract of sale, there will be no hesitation in granting the relief.⁷⁵ Thus, transactions between near relatives are closely scanned with a view of securing to a purchaser the premises he purchased.⁷⁶

A grantee for a valuable consideration, having neither actual nor constructive knowledge of the contract of sale is protected by the Recording Acts.⁷⁷ If, however, the purchaser is in possession of the premises and is exercising acts of ownership, one desiring to purchase is charged with notice of his rights.⁷⁸ If the contract of sale is recorded, it is constructive notice to purchasers.⁷⁹

7. Assignee of vendee.

Modern decisions have clearly established the right of an assignee from an executory vendee to maintain an action of specific performance to compel performance by the vendor.⁸⁰ An option to purchase premises is similarly situated, an assignee of the option having the right to accept it and compel performance by the vendor.⁸¹ Indeed, under some deci-

Davies v. Collins, 25 App. Div. 272, 50 N. Y. Supp. 792; *Seymour v. Seymour*, 28 App. Div. 495, 51 N. Y. Supp. 130; *Meaney v. Way*, 108 App. Div. 290, 95 N. Y. Supp. 745; *Klapp v. Dealy*, 213 App. Div. 523, 211 N. Y. Supp. 22; *Hansen v. Humphrey*, 218 App. Div. 291, 218 N. Y. Supp. 197; *Merithew v. Andrews*, 44 Barb. 200; *Losee v. Morey*, 57 Barb. 561; *Van Epps v. Clock*, 7 N. Y. Supp. 21, 25 St. Rep. 896; *Boyd v. Vanderkemp*, 1 Barb. Ch. 273; *Williams v. Kierney*, 6 St. Rep. 560.

^{74.} *Veeder v. Horstman*, 85 App. Div. 154, 83 N. Y. Supp. 99.

^{75.} *Duffy v. O'Donovan*, 46 N. Y. 223; *Davies v. Collins*, 25 App. Div. 272, 50 N. Y. Supp. 792.

^{76.} *Seymour v. Seymour*, 28 App. Div. 495, 51 N. Y. Supp. 130; *Veeder v. Horstman*, 85 App. Div. 154, 83 N. Y. Supp. 99. See also, *Reynolds v.*

Condon, 110 App. Div. 542, 97 N. Y. Supp. 1.

^{77.} *Martindale v. Western N. Y. & P. R. Co.*, 45 App. Div. 328, 60 N. Y. Supp. 1026; *Reynolds v. Condon*, 110 App. Div. 542, 97 N. Y. Supp. 1.

^{78.} *Merithew v. Andrews*, 44 Barb. 200; *Van Epps v. Clock*, 7 N. Y. Supp. 21, 25 St. Rep. 896.

^{79.} *Carney v. Pendleton*, 139 App. Div. 152, 123 N. Y. Supp. 738.

^{80.} *Epstein v. Gluckin*, 233 N. Y. 490.

The assignor has been held to be a necessary party to an action by the assignee. *Corning v. Roosevelt*, 25 Abb. N. C. 220, 18 Civ. Proc. 399, 11 N. Y. Supp. 758, 33 St. Rep. 154.

^{81.} *Garelik v. Rennard*, 116 Misc. 352, 190 N. Y. Supp. 371; *Grosso v. Sporer*, 123 Misc. 796, 206 N. Y. Supp. 227; *Farone v. Hall*, 128 Misc. 794, 220 N. Y. Supp. 1.

sions the assignee of an option stands in a position more favorable than that of an assignee of a contract.⁸² In the earlier decisions difficulty was encountered on account of the doctrine that the remedy was withheld unless it was "mutual," and, unless it could be said that the assignee had assumed the obligations of the original vendee so as to be subject to specific performance on the suit of the vendor, the remedy was likewise unavailable to the assignee.⁸³ But, even under the earlier authorities, if the assignee had assumed the obligations of his assignor, he was in a position to resort to specific performance against the vendor.⁸⁴

Unless an assignee of a purchaser has, either expressly or by implication, assumed the obligations to be performed by such purchaser, it is generally held that the vendor cannot maintain an action of specific performance against such assignee.⁸⁵ His remedy is against the assignor. On the other hand, if the assignee has assumed performance of the contract, he will be bound by its terms and specific performance may be granted against him.⁸⁶ And one who has accepted an option may be compelled to take title to the premises.⁸⁷ Thus, if he demands performance from the vendor, he may be said to have accepted the contract.⁸⁸ If the assignee seeks recovery of the deposit made by the original purchaser, the court may decree a specific performance against the assignee.⁸⁹ But an assumption of the contract will not be established by the fact that he demanded an

82. *Lewis v. Bollinger*, 115 Misc. 221, 187 N. Y. Supp. 563.

A mere license, however, is held to be unassignable. *Mendenhall v. Klinck*, 51 N. Y. 246.

83. *Genevets v. Feiring*, 136 App. Div. 736, 121 N. Y. Supp. 392; *Dittenfass v. Horsley*, 177 App. Div. 143, 163 N. Y. Supp. 626; *Schuyler v. Kirk-Brown Realty Co.*, 193 App. Div. 269, 184 N. Y. Supp. 95; *Lewis v. Bollinger*, 115 Misc. 221, 187 N. Y. Supp. 563.

84. *Seaman v. Van Rensselaer*, 10 Barb. 81.

Oral contract.—Right to enforce a parol contract withdrawn by part performance from the Statute of Frauds may be transmitted by assignment.

Dodge v. Miller, 81 Hun 102, 30 N. Y. Supp. 726, 62 St. Rep. 681.

85. *Langel v. Betz*, 250 N. Y. 159.

86. *Rollton Syndicate, Inc. v. Meyer*, *Widlitz*, 219 App. Div. 537, 219 N. Y. Supp. 383; *Langel v. Hurwitz*, 126 Misc. 463, 213 N. Y. Supp. 645; reversed on other grounds, 250 N. Y. 159.

87. *Shea v. Southwick*, 206 App. Div. 644, 198 N. Y. Supp. 736.

88. *H. & H. Corporation v. Broad Holding Corp.*, 204 App. Div. 569, 198 N. Y. Supp. 763.

89. *H. & H. Corporation v. Broad Holding Corp.*, 204 App. Div. 569, 198 N. Y. Supp. 763. The decision to the contrary in *Forbes v. Reynard*, 46 Misc. 154, 93 N. Y. Supp. 1097, is deemed unsound.

extension of time for performance.⁹⁰ The earlier cases which required a novation in order to bind the assignee are no longer authoritative.⁹¹

A purchaser cannot transfer his equity in a *part* of the premises so as to invest such assignee with the right to compel specific performance by the vendor. Any other conclusion might result in an indefinite number of actions against the same vendor by reason of a single contract made by him.⁹²

If the contract contemplates the rendition of services or some other personal relation, it may be unassignable, and an alleged assignee may not be allowed to maintain an action of specific performance.⁹³ This is especially true if the contract covers services which require skill, learning, or special knowledge, or involve confidence.⁹⁴

8. Wife or widow.

In order to compel the wife of the vendor to join in his deed and release her dower interest, it is necessary that she be a party defendant in an action to compel the delivery of a deed.⁹⁵ If the wife did not join in the contract of sale, the court cannot compel her to execute a conveyance;⁹⁶ and, in such a case, relief is allowed the purchaser by way of abatement in the purchase price or otherwise.⁹⁷ If she did not sign the contract, she is not a necessary, or even a proper, party.⁹⁸

9. Principal or agent.

Where a contract is under seal, one of the signers acting for an undisclosed principal, such principal is not bound, and any action arising out of the contract is to be maintained by or against the agent, the principal not being a necessary or proper party.⁹⁹ If the contract is not under

90. *Langel v. Betz*, 250 N. Y. 159.

91. *Hugel v. Habel*, 132 App. Div. 327, 117 N. Y. Supp. 78.

92. *Lord v. Underdunk*, 1 Sandf. Ch. 46.

93. *Williams v. Boyle*, 1 Misc. 364, 20 N. Y. Supp. 720, 48 St. Rep. 713.

94. *Martin v. Platt*, 5 St. Rep. 284.

95. *Giannini v. Foster*, 119 Misc. 343, 196 N. Y. Supp. 247.

96. *Schoonmaker v. Bonnie*, 119 N. Y. 565.

97. See, *infra*, IV-K, Vendor's wife refusing to sign deed.

98. *Maas v. Morgenthaler*, 136 App. Div. 359, 120 N. Y. Supp. 1004.

99. *Crowley v. Lewis*, 239 N. Y. 264. See also, *Van Ingen v. Belmont*, 121 Misc. 109, 200 N. Y. Supp. 847.

seal or if the principal is disclosed by the contract, the agent is not a necessary party.¹ Except under unusual circumstances he is not a proper party.²

10. Purchaser at judicial sale.

If a bidder at a judicial sale fails to complete his purchase, the remedy of the referee is a motion to compel him to complete the sale.³ An action at law cannot be maintained by the referee; nor can he maintain an action of specific performance against the purchaser.⁴

B. Pleadings.

1. Essential allegations of complaint.

The complaint in an action by the purchaser of real estate against the contract vendor thereof must allege the making of the contract, the default of the vendor, performance by the plaintiff of the conditions of the contract to be performed by him or his readiness and willingness to perform.⁵ And, though there is little authority on the point, it has been thought necessary for the purchaser to allege facts to show that it is within the power of the defendant to conform to the decree sought.⁶ This usually means that the plaintiff shall allege the title of the defendant.⁷ An allegation that the plaintiff has no adequate remedy at law, though possibly not strictly necessary, is usually inserted by careful pleaders.⁸

In an action by a vendor against an unwilling purchaser, the complaint should allege the ownership of the real estate by the plaintiff, the making of the contract, the failure of the defendant to perform, and the readiness and willingness of the plaintiff to perform.⁹ His ability to perform need

1. *Baeck v. Meinken*, 33 Misc. 371, 68 N. Y. Supp. 428.

2. *Boyd v. Vanderkemp*, 1 Barb. Ch. 273.

3. See *Fiero on Particular Actions and Proceedings*, vol. 3, pp. 2969-2971.

4. *Burton v. Linn*, 21 App. Div. 609, 47 N. Y. Supp. 835.

5. See the following paragraph.

6. *Broder v. Gordon*, 50 Misc. 282, 100 N. Y. Supp. 463; *Hollander v. Lustik*, 79 Misc. 103, 140 N. Y. Supp.

659; *McDonald v. Skinner*, 124 Misc. 545, 209 N. Y. Supp. 219.

7. *Hollander v. Lustik*, 79 Misc. 103, 140 N. Y. Supp. 659; *McDonald v. Skinner*, 124 Misc. 545, 209 N. Y. Supp. 219.

8. See, *infra*, III-B-4, Absence of adequate remedy at law.

9. *Link Realty & Constr. Co. v. Public Constr. Co.*, 169 App. Div. 88, 153 N. Y. Supp. 1032, affirmed without opinion, 222 N. Y. 699.

not be specifically alleged.¹⁰ Moreover, the complaint usually contains an allegation that the plaintiff has no adequate remedy at law.

If the contract is one which does not involve a transfer of real estate, the facts showing the necessity for a resort to equity should generally be alleged.

The complaint should allege facts connecting each of the parties with the cause of action. If a complaint names a party defendant in the title, but makes no mention of him in the pleading, it should be dismissed as against such defendant.¹¹

2. Performance by plaintiff.

The plaintiff in an action of specific performance must allege either that he has performed the conditions of the contract to be performed by him, or that he is ready and willing to perform. If the plaintiff is relying upon his full performance of the conditions precedent in the contract to be performed by him, he can make the general allegation allowed by Rule 92 of the Rules of Civil Practice, to the effect that he has "duly" performed all the conditions of such contract on his part.¹² But the plaintiff is not required to allege the performance of conditions precedent which are to be performed by another,¹³ unless, possibly, such conditions are precedent to the effectiveness of the contract as distinguished from conditions relating to the performance of the agreement.¹⁴ If the contract, as is usually the case, contemplates mutually dependent acts of performance by the parties, as the delivery of the deed by one and the payment of the consideration by the other, the plaintiff must plead that he is ready and willing to perform.¹⁵ A vendor plaintiff is not required to plead his ability to convey a

10. *Clextion v. Tunnard*, 119 App. Div. 709, 104 N. Y. Supp. 665.

11. *Walbridge v. Brooklyn Trust Co.*, 143 App. Div. 502, 128 N. Y. Supp. 686.

12. *Downs v. Lehman*, 123 App. Div. 11, 107 N. Y. Supp. 329.

13. *Downs v. Lehman*, 123 App. Div. 11, 107 N. Y. Supp. 329.

14. *Bedell v. Edgett*, 120 App. Div. 451, 104 N. Y. Supp. 1013.

15. *International Paper Co. v. Hudson River Water Power Co.*, 92 App. Div. 56, 86 N. Y. Supp. 736; *Clextion v. Tunnard*, 119 App. Div. 709, 104 N. Y. Supp. 665; *Link Realty & Constr. Co. v. Public Constr. Co.*, 169 App. Div. 88, 153 N. Y. Supp. 1032, affirmed without opinion, 222 N. Y. 699; *Haight v. Child*, 34 Barb. 186.

marketable title, as his inability is a matter of defense to be alleged and shown by the defendant.¹⁶

3. Authority of agent signing contract.

In an action to compel the performance of a contract signed for one of the parties by an agent, the complaint need not allege the authority of the agent to make the contract; if the contract was unauthorized, that is a matter of defense.¹⁷

4. Absence of adequate remedy at law.

In an action of specific performance involving the conveyance of a tract of land, relief is granted without considering whether the plaintiff may have an adequate remedy at law.¹⁸ In such an action it is unnecessary for the plaintiff to allege that he has no adequate remedy at law.¹⁹ If the defendant wishes to avail himself of the defense that an adequate remedy at law exists, he should plead the defense in his answer.²⁰ But, if the complaint alleges the inadequacy of legal remedy, a denial of that allegation will raise the issue.²¹

When the contract in litigation is not the usual executory contract for the conveyance of real property, specific performance is not granted unless there is no remedy at law. In such an action, the complaint must plead the inadequacy of any legal remedy, or state facts from which such a conclusion may be drawn.²² Even in this class of cases, there

16. *Clextion v. Tunnard*, 119 App. Div. 709, 104 N. Y. Supp. 665; *Link Realty & Constr. Co. v. Public Constr. Co.*, 169 App. Div. 88, 153 N. Y. Supp. 1032, affirmed without opinion, 222 N. Y. 699.

17. *Begwelin v. Lee*, 8 St. Rep. 798.

18. See, *supra*, II-K, Contracts relating to real estate.

19. *Belanewsky v. Gallagher*, 55 Misc. 150, 105 N. Y. Supp. 77; *Wasserman v. Manson*, 225 App. Div. 342. Compare, *McDonald v. Skinner*, 124 Misc. 545, 209 N. Y. Supp. 219.

20. *Rochester & Kettle Falls Land Co. v. Roe*, 8 App. Div. 360, 40 N. Y. Supp. 799, 75 St. Rep. 179; *Witherbee*

v. Myer, 85 Hun 146, 32 N. Y. Supp. 537, 65 St. Rep. 806, reversed on other grounds, 155 N. Y. 446; *Wiswall v. Hall*, 3 Paige 313.

Counterclaim.—That plaintiff has an adequate remedy at law must be pleaded as a separate defense, and may not be embodied in matter pleaded by way of counterclaim. *Longo v. Sparano*, 119 Misc. 402, 196 N. Y. Supp. 344.

21. *Clements v. Sherwood-Dunn*, 108 App. Div. 327, 95 N. Y. Supp. 766, affirmed without opinion, 187 N. Y. 521.

22. *Bateman v. Straus*, 86 App. Div. 540, 83 N. Y. Supp. 785; *International*

are authorities which indicate that the defendant must allege the adequacy of a legal remedy if he wishes to raise the question.²³ The allegation that the plaintiff has no adequate remedy at law is sufficient to permit proof of the necessity for equitable relief.²⁴

5. Matters relating to alternative relief.

In some cases, although the specific performance of the contract is denied, the plaintiff may be allowed other relief in the same action. Thus damages are awarded under some circumstances.²⁵ But, in order to recover the alternative relief, it is necessary that the complaint allege sufficient facts to justify such relief.²⁶ Thus, when damages are sought in case specific performance cannot be granted, the complaint must allege either the full performance of the contract by the plaintiff or that the defendant has waived such performance.²⁷

6. Prayer for relief.

The relief demanded in a complaint does not necessarily characterize the action or limit the plaintiff in respect to the remedy which he may have.²⁸ The action does not fail because the plaintiff has made a mistake as to the form of the remedy, but if the case he states entitles him to any remedy, either legal or equitable, his complaint will not be dismissed because he prayed for a judgment to which he is not entitled.²⁹ The fact that after the allegation of the facts relied upon, the plaintiff demands judgment for a sum of

Paper Co. v. Hudson River Water Power Co., 92 App. Div. 56, 86 N. Y. Supp. 736; Daly v. Sobieski, 123 Misc. 176, 204 N. Y. Supp. 546, affirmed, 212 App. Div. 861, 207 N. Y. Supp. 828 (oral agreement to lease real property).

23. Goldberg v. Kirschstein, 36 Misc. 249, 73 N. Y. Supp. 358; Le Vie v. Fenlon, 39 Misc. 265, 79 N. Y. Supp. 496.

24. Shea v. Keeney, 155 App. Div. 628, 140 N. Y. Supp. 912.

25. See, *infra*, IV-F, Damages in lieu of specific performance.

26. Saperstein v. Mechanics' &

Farmers' Sav. Bank, 228 N. Y. 257; Bowen v. Webster, 3 App. Div. 86, 38 N. Y. Supp. 917; Duke v. Stuart, 105 App. Div. 376, 94 N. Y. Supp. 235, affirming, 45 Misc. 120, 91 N. Y. Supp. 885; Poth v. Washington Square M. E. Church, 207 App. Div. 219, 201 N. Y. Supp. 776.

27. Saperstein v. Mechanics' & Farmers' Sav. Bank, 228 N. Y. 257; Bowen v. Webster, 3 App. Div. 86, 38 N. Y. Supp. 917.

28. Hale v. Omaha Nat. Bank, 49 N. Y. 626.

29. Kuntz v. Schnugg, 99 App. Div. 191, 90 N. Y. Supp. 933; Goldberg v.

money by way of damages, does not preclude the recovery of the same amount by way of equitable relief, if the facts entitle the plaintiff to such relief.³⁰ But, while the prayer for relief is not conclusive as to the character of the action, if the complaint sets forth facts which may support equally an action at law or in equity, its character is determined by the relief demanded.³¹ And, if the complaint attempts to but fails to allege an equitable action for specific performance and only that relief is demanded, it cannot be sustained because from the facts alleged a cause of action for damages can be discerned.³²

If the pleading contains all the essential allegations of an equitable action, and the relief demanded is appropriate to the facts alleged, the fact that all the relief which is essential under the circumstances has not been asked, does not require the dismissal of the complaint.³³

7. Variances and amendments.

While, under the present practice statutes and rules, immaterial variances are to be disregarded and the courts are liberal in permitting amendments to conform to the proof, it is necessary for the orderly conduct of litigations that, if timely objection is made, the plaintiff can recover, if at all, only by proof corresponding to the allegations of the complaint.³⁴ If the plaintiff seeks to compel the performance of a written contract, he should not be permitted, at least without an amendment, to recover by showing an oral contract, or a contract partly written and partly oral.³⁵ Similarly, if the complaint alleges an oral agreement, recovery cannot be had upon a written contract.³⁶ An imma-

Kirschstein, 36 Misc. 249, 73 N. Y. Supp. 358; Jones v. Jones, 18 Hun 438, appeal dismissed, 81 N. Y. 35.

30. Hale v. Omaha Nat. Bank, 49 N. Y. 626; Bensinger v. Erhardt, 74 App. Div. 169, 77 N. Y. Supp. 577.

31. O'Brien v. Fitzgerald, 143 N. Y. 377; Bateman v. Straus, 86 App. Div. 540, 83 N. Y. Supp. 785.

32. Poth v. Washington Square M. E. Church, 207 App. Div. 219, 201 N. Y. Supp. 776; Dingwall v. Chapman, 63 Misc. 193, 116 N. Y. Supp. 520.

33. Buess v. Koch, 10 Hun 299, 53 How. Pr. 92.

34. Frank v. Witlin, 201 App. Div. 709, 194 N. Y. Supp. 795; Currie v. Cowles, 6 Bosw. (19 Super. Ct.) 452. See also, Harris v. Knickerbacker, 5 Wend. 638, reversing, 1 Paige 209. See Civil Prac. Act, § 434; Rules of Civil Practice, rule 166.

35. Steiner v. Hellman, 7 App. Div. 248, 40 N. Y. Supp. 36, 74 St. Rep. 647.

36. Lennon v. Farrell, 46 App. Div. 621, 61 N. Y. Supp. 370.

terial variance may be disregarded, or the pleading may be conformed to the proof.³⁷ But, if the complaint seeks only equitable relief, legal relief only cannot, as a general rule, be granted.³⁸ In an action for the specific performance of an agreement to give a contractor a mortgage to secure the payment of construction work, if the contractor fails to prove his equitable cause of action, it has been thought that the complaint will not be amended so as to allow him to recover on *quantum meruit* for the labor performed and materials furnished.³⁹ But under the modern practice an amendment changing the prayer for relief, from specific performance to rescission has been sustained.⁴⁰

8. Joinder of causes of action.

Causes of action are not improperly joined because the plaintiff in his complaint seeks damages as well as specific relief.⁴¹ A claim for a specific performance of an alleged contract to convey real estate, and for payment of a reasonable sum for the use and possession thereof, is not setting up two distinct causes of action which can not be legally united.⁴²

9. Bill of particulars

A bill of particulars may properly be granted in an action of specific performance, where the circumstances are such that a party should be informed with greater particularity of the matters for which he is to be tried.⁴³

37. *Lobdell v. Lobdell*, 36 N. Y. 327; *Haight v. Child*, 34 Barb. 186.

38. *Bowen v. Webster*, 3 App. Div. 86, 38 N. Y. Supp. 917.

39. *Flanders v. Rosoff*, 111 App. Div. 1, 97 N. Y. Supp. 514, affirmed without opinion, 188 N. Y. 616.

40. *Badger v. Scobell Chemical Co., Inc.*, 129 Misc. 612, 222 N. Y. Supp. 315.

41. *Witherbee v. Myer*, 84 Hun 146, 32 N. Y. Supp. 537, 65 St. Rep. 806, reversed on other grounds, 155 N. Y. 446.

42. *Spier v. Robinson*, 9 How. Pr. 325.

43. *United States Land, etc., Co. v. Mercantile Trust Co.*, 54 Hun 417, 7 N. Y. Supp. 534, 27 St. Rep. 187.

10. Form of complaint in an action by vendor of real estate.⁴⁴

SUPREME COURT—COUNTY OF NEW YORK.

LINCOLN TRUST COMPANY, as Sole
Surviving Substituted Trustee
under the Last Will and Testa-
ment of Mary G. Pinkney, de-
ceased, for the benefit of Julia
Morris Curtiss Lawrence,

Plaintiff,

vs.

WILLIAMS BUILDING CORPORATION,
Defendant.

The plaintiff by Elkus, Gleason & Proskauer, its attorneys, complaining of the defendant, alleges on information and belief:

I. That the plaintiff is a domestic corporation duly organized and existing under the laws of the State of New York.

II. That the defendant is a domestic corporation duly organized and existing under the laws of the State of New York.

III. That on and before the 21st day of August, 1916, the plaintiff was and still is the owner in fee and possessed of certain real property described in the agreement hereinafter referred to, a copy of which agreement is annexed hereto and marked Exhibit A.

IV. That on or about the 21st day of August, 1916, the defendant entered into an agreement in writing, with the plaintiff, a copy of which agreement is hereto annexed and made a part hereof and marked Exhibit A.

V. That the defendant on the execution of the said agreement, paid to the plaintiff the sum of two thousand (\$2,000) dollars as therein provided for.

VI. That plaintiff has always been and still is ready, able and willing to perform the said agreement on its part, and that on the 25th day of October, 1916, at the hour named in said contract, at the office of Messrs. Elkus, Gleason & Proskauer, No. 111 Broadway, Borough of Manhattan, City of New York, plaintiff tendered to the defendant a deed of the said premises pursuant to and in accordance with the terms of the said agreement and then and there offered to allow one-half of the second half of the annual taxes for the year 1916, as provided for in the contract and offered to do and perform any and all other things required by the seller by the contract aforementioned, and demanded that the defendant execute the purchase money bonds and mortgages as provided for in the said contract and demanded payment of the balance of the purchase money, but

⁴⁴. This form is adapted from the complaint used in *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313.

the defendant then refused and ever since has refused to accept the said deed and to perform any of the other things required to be performed by it according to the said agreement.

Wherefore, plaintiff demands judgment that the defendant be decreed to specifically perform said agreement and that it receive plaintiff's said deed and execute the bonds and mortgages in accordance with the terms of said agreement, and pay to the plaintiff the balance of the purchase price provided by said agreement to be paid to the plaintiff, in cash, with interest thereon, from the 25th day of October, 1916, and that the plaintiff have such other and further judgment and relief as may be just with the costs of this action.

11. Another form in action by vendor.⁴⁵

SUPREME COURT—WASHINGTON COUNTY.

ALBERT W. HARRIS,	}	Plaintiff,
<i>vs.</i>		
ALEX P. SHORRALL and GEORGE V. STOUKAS,		Defendants.

The above named plaintiff, for a complaint herein against the above named defendants, alleges upon information and belief:

I. That on and before the nineteenth day of January, 1918, the plaintiff was, and still is, the owner in fee and possessed of the real property in the County of Washington, N. Y., hereinafter described in the annexed Schedule A.

II. That on the said nineteenth day of January, 1918, the plaintiff and defendants entered into an agreement in writing, a copy of which is hereto annexed, marked Schedule B and made a part hereof, for the sale by plaintiff and purchase by defendants, of the said real property.

III. That the defendants, on the execution and delivery of the said agreement, paid to the plaintiff the sum of five hundred dollars as in said agreement provided, and that plaintiff has since been and still is ready and willing to perform the said agreement on his part.

IV. That after said nineteenth day of January, 1918, and prior to the fifteenth day of February, 1918, plaintiff duly procured an agreement of the Albany City Savings Institution (referred to in the said contract between the plaintiff and the defendants as the Albany Savings Bank) for the extension to February 15th, 1920, of the payment of \$10,000 of the \$11,000 secured by the mortgage

⁴⁵ This form is adapted from the complaint used in *Harris v. Shorall*, 230 N. Y. 343.

incumbrance on said premises held by the said Savings Institution, and that plaintiff thereupon agreed with defendants to take their mortgage on said premises as security for the payment to him on February 15th, 1920, of the remaining sum of \$1,000 to be paid by him to said Savings Institution in reduction of the said mortgage incumbrance held by it, to all of which defendants agreed.

V. That on the fifteenth day of February, 1918, the plaintiff duly tendered to defendants a warranty deed of said premises subject to said mortgage incumbrance of \$10,000 and a duly certified search of the Clerk of the County of Washington showing the title of said premises to be in plaintiff and showing said premises to be free and clear of all incumbrances excepting the mortgage incumbrance of \$11,000 held by said Albany City Savings Institution, and demanded of defendants the payment of the balance of the purchase money, but the defendants then refused and ever since have refused to accept said deed and to pay the balance of the purchase money according to said agreement.

Wherefore, plaintiff prays judgment that the defendants be required to perform said agreement, pay to plaintiff the sum of \$4,500 with interest thereon from February 15th, 1918, and execute and deliver to plaintiff a mortgage on said premises as security for the payment to plaintiff of the sum of \$1,000 with interest thereon from February 15th, 1918, and that plaintiff have such other and further relief as may be just and equitable besides the costs of this action.

12. Form of complaint in action to compel performance of contract relating to testamentary disposition of property.⁴⁶

SUPREME COURT—FULTON COUNTY.

LOREN E. WINNE, Plaintiff, <i>vs.</i> MAGDALINE WINNE, <i>et al.</i> , Defendants.	}
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The plaintiff for a complaint herein alleges and shows to the court:

I. That prior to the 3rd day of December, 1898, Emily Winne was the owner in fee and in possession of all that piece or parcel of land situate in the city of Gloversville, Fulton county, N. Y., and known as No. 16 Lincoln street, and bounded and described as follows: On the south by said Lincoln street; on the east by lands of Edgar C. Wilson; on the north by lands formerly owned by George Nickloy, deceased, and on the west by lands of Mrs. Robert McDougal, con-

⁴⁶. This form is adapted from that used in *Winne v. Winne*, 166 N. Y. 263.

sisting of a dwelling house and city lot, which she occupied as a residence at the time of her death.

II. That the said Emily Winne, so owning and possessed of said premises, died intestate in the city of Gloversville, Fulton county, New York, on the 3rd day of December, 1898, she being at the time of her death seized in fee simple of the real estate hereinbefore described, and also the owner of certain personal property, consisting of household effects, money and other personal property, to the amount and value of about five hundred dollars.

III. That on or about the 19th day of December, 1898, Magdaline Winne was appointed administratrix of the goods, chattels and credits of the said Emily Winne, by the surrogate of Fulton county; and said Magdaline Winne thereupon entered upon the discharge of her duties as such administratrix, and is still acting as such, and that as such administratrix she now has in her possession the personal property and effects of said Emily Winne, deceased.

IV. That the plaintiff is the son of Loren Wetherbee and Harriet Wetherbee.

V. That prior to 1870 Loren Wetherbee delivered and turned over to Harriet Wetherbee, mother of this plaintiff, the custody and control of this plaintiff, then an infant of two years of age, and absconded from his home, and abandoned his said wife and this plaintiff, and left the plaintiff in the sole charge and control of his said mother; and that since said time the said Loren Wetherbee has never returned to his said home, and has never claimed nor exercised any right nor authority to the custody or control of this plaintiff, but that on the contrary has left the plaintiff and his said mother absolutely dependent upon their own resources.

VI. That during on or about the year 1870, and after said Loren Wetherbee had surrendered the control and custody of this plaintiff unto Harriet Wetherbee, his mother, and after he had absconded from his home and abandoned this plaintiff and his mother, in the manner aforesaid, the said Harriet Wetherbee, mother of this plaintiff, for and on behalf of and for the benefit of this plaintiff, then an infant of two years of age, made and entered into an agreement to and with one Emily Goodemote, now the said Emily Winne, deceased, with the consent of her husband, Hugh Goodemote, wherein and whereby it was stipulated and agreed that if the said Harriet Wetherbee, mother of this plaintiff, would surrender this plaintiff unto the said Emily Goodemote, now the said Emily Winne, deceased, and allow the said Emily Goodemote to keep and retain this plaintiff as her own son, that she, the said Emily Goodemote, now the said Emily Winne, deceased, would take this plaintiff as her own child and keep, maintain, support and educate him, and at her death make him the sole heir to all her property which she might own at the time of her death.

VII. That thereupon and immediately after the contract aforesaid was made, plaintiff's mother did deliver up and surrender this plaintiff to the said Emily Goodemote, now the said Emily Winne, deceased, and the said Emily Winne thereafter gave to this plaintiff the name of Loren E. Winne; and that from said time this plaintiff

and the said Emily Winne lived together in the relation of mother and son until this plaintiff became of full age; and that during all of said time this plaintiff performed the duties of a son towards her, the said Emily Winne, and was subjected to the restraint, control and management of the said Emily Winne, who acted as a parent, including the infliction of parental punishment and reward. And this plaintiff fully performed all the duties and conditions of said contract on his part to be performed.

VIII. That in violation of the agreement and contract made between plaintiff's mother and said Emily Winne for and on behalf of this plaintiff, the said Emily Winne failed to make this plaintiff the sole heir of all property of which she was the owner and possessor at the time of her death, but died intestate as hereinbefore described.

IX. That Catherine Robb, Magdaline Winne, Hannah Vunck, Fanny Baker, Grace Phillips, Helen E. Lang, Minnie A. Lang, Arthur E. Lang are the next of kin by blood relationship of said Emily Winne, deceased, and as such next of kin claim to be the heirs of said Emily Winne, deceased, and now claim to be entitled to the real and personal property hereinbefore described; and as such heirs claim right to possession thereof, and are now, by their agent and attorney, in actual possession and control thereof.

That the said Catherine Robb, Magdaline Winne, Hannah Vunck, Fanny Baker and Grace Phillips each claim to be the owners of and entitled to an undivided one-sixth part of said real and personal property. And that the defendants, Helen E. Lang, Minnie A. Lang and Arthur E. Lang, each claim to be the owner of an undivided one-eighteenth part of said premises. And that Alice Lang, whose given name is unknown to plaintiff, and is sued by the name of Alice, is the wife of the defendant, Arthur E. Lang, and as such claims an inchoate right of dower in and to the share of her husband.

That each of the parties hereto are of full age and sound mind, and that all of the defendants reside in the State of New York, except Fanny Baker, who resides at Troy, Bradford county, Pennsylvania; and the defendants Helen E. Lang, Minnie A. Lang, Arthur E. Lang and Alice Lang, who reside at Fondulac, Fondulac county, in the State of Wisconsin.

X. That the lands and premises hereinbefore described consist of a two-story dwelling house and an ordinary city lot, and as plaintiff is informed and believes, is of the value of about \$4,000.00, and was the only real estate owned by the plaintiff at the time of her death.

Wherefore, plaintiff demands judgment:

1. That this plaintiff be adjudged and decreed to be the sole heir of the estate and property of Emily Winne, deceased, and that as such sole heir he is entitled to the real and personal property mentioned and described in the complaint herein.

2. That the said Magdaline Winne, personally or as administratrix of the estate of Emily Winne, deceased, pay and deliver to the plaintiff in this action, all money, property and effects which has come into her hands as such administratrix, or individually. And that the defendants, Catherine Robb, Magdaline Winne, Hannah Vunck,

Fanny Baker, Grace Phillips, Helen E. Lang, Minnie A. Lang, Arthur E. Lang and Alice Lang, his wife, and all persons claiming under them, or any of them, be forever barred and enjoined from any right, title, claim or interest as heirs or next of kin of Emily Winne, deceased. And that the plaintiff be adjudged to be the absolute owner and entitled to the immediate possession of the real and personal property herein described; and such other or further order, decree or relief as may be just and equitable, besides the costs and disbursements of this action.

13. Form of complaint in action to compel transfer of stock.⁴⁷

SUPREME COURT—ERIE COUNTY.

<p>EDNA P. WADDLE, as Administra- trix of the Estate of CURTICE H. WADDLE, deceased,</p>	}	<p>Plaintiff,</p>
<p>vs.</p>		
<p>OLIVER CABANA, JR., Defendant.</p>		

The plaintiff herein by Carlton E. Ladd, her attorney, complains of the defendant and for cause of action alleges as follows:

That on or about the 1st day of August, 1912, at Buffalo, N. Y., this defendant duly entered into a written agreement, a copy of which is hereto attached and marked "Schedule A," with one Curtice H. Waddle, both of the City of Buffalo, N. Y. Thereupon the said Curtice H. Waddle duly performed every condition of said agreement on his part to be performed.

That on the 8th day of September, 1912, the said Curtice H. Waddle died intestate in the City of Buffalo, N. Y., and thereafter and on or about the 21st day of September, 1912, this plaintiff was duly appointed administratrix of the estate of said Curtice H. Waddle by the Surrogate's Court of Erie County, and thereupon duly qualified and is now acting as such administratrix.

That thereafter and from time to time prior to the commencement of this action, this plaintiff duly demanded of this defendant the sale and transfer of said stock to her, as in said agreement provided, and the payment to her of the dividends accruing on such stock and received by the defendant, as provided in said agreement. That this defendant has neglected and refused to sell and transfer to this plaintiff the stock provided for in said agreement, or any part thereof, and has neglected and refused to pay to this plaintiff the dividends accruing on said stock, or any of them, and still refuses so to do,

⁴⁷ This form is adapted from that used in *Waddle v. Cabana*, 220 N. Y. 18.

and has neglected and refused to carry out on his part the terms and conditions of said agreement.

This plaintiff further alleges that on the 31st day of July, 1913, she duly tendered to this defendant the promissory note executed by herself individually and as administratrix of the estate of Curtice H. Waddle, in the sum of twenty-five thousand dollars (\$25,000.00) in the form and payable in the manner provided in said agreement, and further duly tendered to this defendant the sum of four thousand dollars (\$4,000.00) as a first payment on said purchase price of said stock and the first year's interest on said sum of \$25,000.00, all as provided for in said agreement, and that on said day and at the time of said tender above referred to this plaintiff duly demanded of this defendant the sale and transfer to her, in the manner provided for in said agreement, of one hundred shares of the capital stock of the Buffalo Specialty Company, which demand was refused. That this plaintiff has duly performed on her part all the terms and conditions of this contract by her to be performed, and that this defendant has neglected and refused to perform his part of said agreement.

This plaintiff further alleges that the stock of the Buffalo Specialty Company, a corporation, has a large and special value and that the said stock can not be readily obtained in the market and has, as plaintiff is informed and verily believes, a very large but uncertain earning power, the exact extent of which this plaintiff has not been able to determine. That this defendant is president of the Buffalo Specialty Company and has refused to give this plaintiff any evidence or information in regard to the value of said stock or the amount of the dividends earned thereon and has always maintained control of said corporation personally.

That by reason of the premises the plaintiff alleges that she has no adequate remedy at law.

Wherefore, this plaintiff asks judgment directing that this defendant be required to sell and transfer to her one hundred (100) shares of the capital stock of the said Buffalo Specialty Company, a corporation, subject to the right of the defendant to hold the same as collateral security for the payment of the whole purchase price thereof, and that this defendant be required to pay over to this plaintiff all dividend moneys which have accrued on said stock since August 1, 1912, and heretofore received by this defendant, with interest thereon, and for such other and further relief as may to the court seem just and proper in the premises, together with the costs of this action.

C. *Lis pendens*.

In an action by a purchaser to compel the specific performance of a contract of sale, the plaintiff may, under section 120 of the Civil Practice Act, cause a notice of pendency of the action to be filed.⁴⁸ A *lis pendens* may be

⁴⁸. Weber v. Fowler, 11 How. Pr.

filed in an action on a contract under which the defendant agreed to sell from certain premises to the plaintiff yearly for a term of years a quantity of lumber and further agreed not to transfer the lands so as to jeopardize or prevent the fulfillment of the contract, and the plaintiff seeks the impression of a lien on the premises as well as the specific performance of the contract.⁴⁹

Where the plaintiff in an action for specific performance has filed the summons and complaint and notice of pendency but has not served the summons and complaint on the sole defendant named, he is entitled to an *ex parte* order discontinuing the action without costs, unless substantial rights had accrued and injustice had been done, though the defendant named has served an answer which was forthwith returned.⁵⁰

On appeal from a judgment in favor of the owner, unless an undertaking is given by the appellant as required by section 586 of the Civil Practice Act, the respondent is entitled to an order discharging the *lis pendens*.

D. Temporary injunction.

A temporary injunction is rarely granted in an action of specific performance. In an action by a vendor of real estate, it is only in unusual circumstances that an injunction *pendente lite* would be of any avail; and in an action by a contract purchaser against the owner, the plaintiff's rights are usually adequately protected by the filing of a *lis pendens*. Before the enactment of the Code of Civil Procedure authorizing the filing a notice of pendency, an injunction was sometimes granted to restrain the conveyance of the premises by the vendor during the pendency of the action.⁵¹ In actions relating to personal property, which are permissible under circumstances which apparently require equitable intervention,⁵² a temporary injunction may be granted restraining the disposition of the property in question,⁵³ but this will not be done unless the plaintiff

49. *St. Regis Paper Co. v. Santa Clara Lbr. Co.*, 62 App. Div. 538, 71 N. Y. Supp. 82, affirming, 34 Misc. 428.

50. *Nosrep Corp. v. Clinton Securities Corp.*, 193 App. Div. 878, 184 N. Y. Supp. 771.

51. See, *Baldwin v. Salter*, 8 Paige 473.

52. See, *supra*, II-L, Contracts relating to personal property.

53. *Rau v. Seidenberg*, 53 Misc. 386, 104 N. Y. Supp. 798.

shows that he will be entitled to equitable relief.⁵⁴ And, in an action to compel the performance of an agreement to lease premises, an injunction *pendente lite* has been granted to restrain the defendant from leasing the premises to a third party.⁵⁵ In injunction *pendente lite* will not be granted where the rights of the parties are not clear, or where the complaint fails to state a cause of action.⁵⁶ The courts are especially strict when a *mandatory* injunction is sought.⁵⁷

E. Place of trial.

The place of trial of an action of specific performance relating to the title of real property is fixed by section 183 of the Civil Practice Act in the county where the property is located.⁵⁸ An action by the vendor, as well as an action by the vendee, is within the language of that section.⁵⁹ If the action is for the performance of a contract for the exchange of parcels of real estate situated in two different counties, it may be tried in either.⁶⁰ If the action relates to personal property, the proper venue is in the county where one of the parties resided at the time of the commencement of the action, as is provided in section 182.

F. Jury trial.

An action of specific performance being of equitable cognizance, a jury trial of the issues is not a matter of right. Although the plaintiff may be entitled either to legal or to equitable relief, the bringing of the action of a distinctly equitable character is a clear waiver, so far as he is concerned, of a trial by jury. The court, in determining the mode of trial, may as to him be governed by the nature of the action as stated in the complaint.⁶¹ The defendant does

54. *Davis v. Epoch Producing Co.*, 91 Misc. 631, 155 N. Y. Supp. 597.

55. *Ginsberg v. Altarsh*, 130 Misc. 891, 224 N. Y. Supp. 622.

56. *Reliance Grant Corp. v. Reliance Ball Bearing Co.*, 205 App. Div. 320, 199 N. Y. Supp. 476; *Fargo v. New York, etc., R. Co.*, 3 Misc. 205, 23 N. Y. Supp. 360, 52 St. Rep. 205.

57. *Fargo v. New York, etc., R. Co.*, 3 Misc. 205, 23 N. Y. Supp. 360, 52 St. Rep. 205.

58. *Hall v. Gilman*, No. 2, 77 App. Div. 464, 79 N. Y. Supp. 307.

59. *Turner v. Walker*, 70 App. Div. 306, 75 N. Y. Supp. 260.

60. *Smith v. Van Veghten*, 184 App. Div. 813, 172 N. Y. Supp. 697; *Kearr v. Bartlett*, 47 Hun 245, to the contrary, must be deemed overruled by the later decisions.

61. *Davison v. Jersey Co.*, 71 N. Y. 333.

not stand in the same position. Although he is not entitled to a jury trial in an action of specific performance when only equitable relief is sought, he cannot be deprived of a jury trial in a proper case, because the plaintiff has demanded equitable instead of legal relief.⁶² That is to say, if it develops on the trial of the action at Special Term that the equitable relief cannot be granted and the case is one where it is proper to allow damages, the defendant is entitled to have a jury trial.⁶³ But, if the defendant makes no objection to the continuance of the action before the justice, he is deemed to have waived the point and the judgment for damages awarded by the court will be sustained.⁶⁴ An application for a jury trial made at the commencement of the trial may properly be denied, where it is as yet uncertain whether the equitable relief may be granted.⁶⁵

Where a counterclaim asking for specific performance is interposed in an action at law, the defendant is entitled to have the issues tried at Special Term, as provided in section 424 of the Civil Practice Act.⁶⁶

In an action for the specific performance of an agreement and for an accounting, when the execution of the agreement is in issue, there can be no compulsory reference on the ground that the examination of a long account is involved until the right to the accounting is determined by trial at Special Term.⁶⁷

G. Submission of controversy.

It is frequently the practice, especially in the First Department, when a question arises as to whether the vendor's title is marketable, to submit the controversy to the court under sections 546-548 of the Civil Practice Act. The specific performance of a trust may also be decreed by that procedure.⁶⁸

62. *Davison v. Jersey Co.*, 71 N. Y. 333; *Koehler v. Brady*, 87 App. Div. 326, 84 N. Y. Supp. 457, affirmed without opinion, 181 N. Y. 503.

63. *Goldberg v. Kirschstein*, 36 Misc. 249, 73 N. Y. Supp. 358.

64. *Greason v. Kettletas*, 17 N. Y. 491.

65. *O'Beirne v. Bullis*, 158 N. Y. 466.

66. *Epstein v. Rockville Center Imp. Co.*, 164 App. Div. 177, 149 N. Y. Supp. 638.

67. *Cayard v. Texas Crude Oil, etc., Co.*, 118 App. Div. 299, 103 N. Y. Supp. 437.

68. *Associate Alumni v. General Theological Seminary*, 163 N. Y. 417.

H. Limitation of action; laches.**1. Statute applicable.**

A court of equity has no more power to disregard the Statute of Limitations than has a court of law.⁶⁹ The statute which is applicable to an action of specific performance is that contained in section 53 of the Civil Practice Act, and the action is barred unless it is commenced within ten years after its accrual.⁷⁰ Although the contract in question is sealed, the action is not deemed to be an action on a sealed instrument within the meaning of section 47 of the Civil Practice Act, providing a limitation of twenty years in certain cases.⁷¹

It has been held that where the vendor agrees with the vendee, at any time after six months from the date of the deed to accept a reconveyance of the premises and allow the purchaser ten per cent on his investment, an action for the specific performance of such an agreement is governed by the six-year Statute of Limitations, and accrues six months after the date of the deed. The rule applied is that when a remedy in equity is concurrent with a remedy at law, if the cause of action at law is barred, the cause of action in equity is also barred.⁷²

An action for damages in lieu of specific performance of a contract for the conveyance of lands is barred if, when it was commenced, the ten years' limitation provided for

69. *McCotter v. Lawrence*, 4 Hun 107, 6 T. & C. 392.

70. *Bruce v. Tilson*, 25 N. Y. 194; *Peters v. Delaplaine*, 49 N. Y. 362; *Wooley v. Stewart*, 222 N. Y. 347; *McCormack v. Halstead*, 132 Misc. 916, 231 N. Y. Supp. 213; *McCotter v. Lawrence*, 4 Hun 107, 6 T. & C. 392; *Cooley v. Lobdell*, 82 Hun 93, 31 N. Y. Supp. 202, 63 St. Rep. 603, affirmed, 153 N. Y. 596; *Kelly v. Potter*, 16 N. Y. Supp. 446.

The presumption of payment, which arose under 2 Revised Statutes 301, section 48, after the expiration of twenty years from the time the right of action accrued on a sealed instru-

ment, was designed to shield a defendant and was not applicable in favor of a plaintiff vendee who sought to compel the vendor to convey. *Morey v. Farmers' Loan & Trust Co.*, 14 N. Y. 302. Moreover, the presumption of payment under such section was not sufficient to sustain a defense of payment when the vendor sought to secure possession of the premises in an action of ejectment. *Lawrence v. Hall*, 14 N. Y. 477.

71. *Peters v. Delaplaine*, 49 N. Y. 362.

72. *Winne v. Queens Land and Title Co.*, 166 App. Div. 314, 149 N. Y. Supp. 664.

actions in equity had run against the cause of action for specific performance.⁷³

2. When cause of action accrues.

The cause of action accrues when a party is entitled to bring the action.⁷⁴ If the time of performance is not expressly stated in the contract, it is generally to be performed within a reasonable time, and the statute may then commence to run.⁷⁵ A purchaser may commence the action when he has performed the agreements to be performed by him; that is, upon payment or tender of payment; and the limitation then begins to run.⁷⁶ No demand is necessary, and a subsequent demand for performance does not extend the ten-year period.⁷⁷ No formal denial by the vendor of the right of the vendee is necessary before the statute commences to run.⁷⁸ Nor does the fact that the plaintiff has been in possession since the execution of the contract delay the accrual.⁷⁹ So, too, the conveyance of the property to another person so that he thereby puts it out of his power to perform the contract, does delay the accrual until the time of such transfer.⁸⁰

3. Laches.

The remedy of specific performance is not a strict legal right and is not granted when the lapse of time renders such relief inequitable in its consequences.⁸¹ On the other hand, a delay for which a reasonable excuse is presented, or

73. *Cooley v. Lobdell*, 153 N. Y. 596.

74. *Bruce v. Tilson*, 25 N. Y. 194; *Peters v. Delaplaine*, 49 N. Y. 362; *McCotter v. Lawrence*, 4 Hun 107, 6 T. & C. 392.

75. *Town of Huntington v. Titus*, 50 App. Div. 468, 64 N. Y. Supp. 58, affirmed without opinion, 169 N. Y. 579.

76. *Bruce v. Tilson*, 25 N. Y. 194; *McCotter v. Lawrence*, 4 Hun 107, 6 T. & C. 392; *Kelly v. Potter*, 16 N. Y. Supp. 446.

77. *Bruce v. Tilson*, 25 N. Y. 194; *McCotter v. Lawrence*, 4 Hun 107, 6 T. & C. 392.

78. *McCotter v. Lawrence*, 4 Hun 107, 6 T. & C. 392.

79. *Kelly v. Potter*, 16 N. Y. Supp. 446.

80. *Cooley v. Lobdell*, 153 N. Y. 596.

81. *Finch v. Parker*, 49 N. Y. 1; *Delevan v. Duncan*, 49 N. Y. 495; *Merchants Bank v. Thompson*, 55 N. Y. 7; *Haynes v. Nourse*, 114 N. Y. 595; *Groesbeck v. Morgan*, 206 N. Y. 385; *Darrow v. Bush*, 45 App. Div. 262, 61 N. Y. Supp. 2; *Town of Huntington v. Titus*, 50 App. Div. 468, 64 N. Y. Supp. 58, affirmed without opinion, 169 N. Y. 579; *Fletcher v. Manhattan L. Ins. Co.*, 204 App. Div. 814, 199 N. Y. Supp. 180, affirmed, 236 N. Y. 671; *Ringler v. Jetter*, 35 Misc. 750, 72 N. Y. Supp. 362; *Clarke v. Borough Asphalt Co.*, 93 Misc. 662, 157

a delay unaccompanied by any change in the situation of the parties or the condition of the premises, although there may have been a lapse of several years, does not necessarily bar the action.⁸² Mere delay is not fatal, unless in the meantime it has become inequitable to enforce the contract.⁸³ The defense of laches is to be considered wholly independent of the Statute of Limitations. Although the action is brought within the period prescribed by the statute, it may have been so delayed as to preclude the granting of equitable relief.⁸⁴ In determining whether a delay is fatal, regard must always be had to the peculiar circumstances of each

N. Y. Supp. 581; *Watt v. Rogers*, 2 Abb. Pr. 261; *McWilliam v. Long*, 32 Barb. 194, 19 How. Pr. 547; *Van Zandt v. Mayor, etc., of N. Y.*, 8 Bosw. (21 Super. Ct.) 375; *Northrup v. Gibbs*, 1 N. Y. Supp. 465, 17 St. Rep. 320, 28 Week. Dig. 505; *Covart v. Johnston*, 15 N. Y. Supp. 785, 40 St. Rep. 62, affirmed without opinion, 137 N. Y. 560; *Burt v. Oneida Community*, 16 N. Y. Supp. 289, 41 St. Rep. 48; *Jencks v. Kearney*, 17 N. Y. Supp. 143, 42 St. Rep. 826, affirmed without opinion, 138 N. Y. 634. "It seems that whether specific performance shall be adjudged, depends much upon the circumstances of each case, of which the lapse of time unexcused is one. It is not yet the rule, however, that the time fixed in a contract for the performance of it, is necessarily of its essence. The mere efflux of time will not of itself always lead to a denial of relief. When the lapse of time is occasioned or accompanied, by a refusal or a failure to claim or act under the contract, and is so great or of such characteristics as to amount to a waiver or abandonment of the contract, the party who comes not into court until after such delay, will have forfeited all claim to equity." *Merchants' Bank v. Thompson*, 55 N. Y. 7.

Infants.—The fact that all the heirs of a deceased plaintiff, in an action to compel a specific performance by the

vendor of a contract for the sale of land, are infants is not a legal excuse for a failure on their part to perform the contract of their ancestor, and the laches which would have barred the action had he survived, will bar its prosecution by them. *Hayes v. Nourse*, 114 N. Y. 595.

82. *Bennet v. Bennet*, 10 App. Div. 550, 42 N. Y. Supp. 435; *Robbins v. Clock*, 59 Misc. 289, 112 N. Y. Supp. 246; *Began v. Pettus*, 80 Misc. 120, 140 N. Y. Supp. 765, affirmed, 167 App. Div. 622, modified, 223 N. Y. 662; *Williston v. Williston*, 41 Barb. 635; *Leggett v. Edwards*, Hopk. Ch. 530; *Waters v. Travis*, 9 Johns. 450.

83. *Deen v. Milne*, 113 N. Y. 303.

84. *Peters v. Delaplaine*, 49 N. Y. 362; *Groesbeck v. Morgan*, 206 N. Y. 385; *Darrow v. Bush*, 45 App. Div. 262, 61 N. Y. Supp. 2. "The Statute of Limitations does not affect the general principles of equity, which declare that where a party, in attempting to enforce his rights, is guilty of unreasonable and inexcusable delay he should be denied equitable relief, although the lapse of time may not be sufficient to bring the case within the operation of the statute, and further that this principle is peculiarly applicable to actions for specific performance." *Darrow v. Bush*, 45 App. Div. 262, 61 N. Y. Supp. 2.

case.⁸⁵ A material change in the value of the premises during the interval of delay, may influence the court to deny the relief.⁸⁶ A party cannot urge the ground of laches so far as the delay has been occasioned by his own indecision or failure to act.⁸⁷ Or, if the delay is by common consent of the parties, and no prejudice has been caused thereby, the court will not ordinarily refuse relief.⁸⁸

Laches is usually a defense which must be pleaded and proved by the defending party.⁸⁹ But it is not necessary for the defendant to plead the laches of the plaintiff, where the plaintiff's proof establishes the existence thereof.⁹⁰

I. Appeals.

1. Civil Practice Act, § 586. Rights of parties after appeal from judgment in favor of owner in certain real property actions.

When an appeal is from a judgment in favor of the owner of real estate in an action to set aside a conveyance thereof, or in an action to compel the specific performance of a contract for the sale thereof, such owner shall have the same right to sell or dispose of the same as though no appeal had been taken, unless the appellant shall file with the clerk of the court a written undertaking in a sum fixed by the court or a judge thereof, upon a notice to the respondent of at least ten days, and to be approved by such court or judge, to the effect that the appellant, in case the judgment appealed from shall be affirmed, will pay to such owner such damages as he may suffer by reason of such appeal, not exceeding the amount of the penalty in such undertaking. Such undertaking may be filed at any time during the appeal, but any sale of such real estate or contract to sell the same in good faith and for a valuable consideration, after said judgment and before the filing of such undertaking, shall be as valid as if such undertaking had not been filed. In case such undertaking shall not be filed, the respondent shall be entitled at any time during such appeal to an order discharging of record any notice of pendency of action filed in the action, and, in an action to compel the specific performance of a contract for the sale of real estate, also canceling and discharging of record said contract in case the same has been recorded.

2. Civil Practice Act, § 597. Security to stay execution on judgment or order directing conveyance.

If the appeal is taken from a judgment or order directing the execution of a conveyance, or other instrument, it does not stay the execution of the judgment

85. *Groesbeck v. Morgan*, 206 N. Y. 385.

86. *Groesbeck v. Morgan*, 206 N. Y. 385.

87. *Merchants' Bank v. Thompson*, 55 N. Y. 7.

88. *Leaird v. Smith*, 44 N. Y. 618.

89. *Begen v. Pettus*, 80 Misc. 120, 140 N. Y. Supp. 765, affirmed, 167 App. Div. 622, modified, 223 N. Y. 662.

90. *Fletcher v. Manhattan L. Ins. Co.*, 204 App. Div. 814, 199 N. Y. Supp. 180, affirmed, 236 N. Y. 671.

or order until the instrument is executed and deposited with the clerk with whom the judgment or order is entered, to abide the direction of the appellate court.

3. Effect of statutes.

If the purchaser takes an appeal from a judgment directing specific performance against him, but fails to give the undertaking specified in section 586 of the Civil Practice Act, or to procure a stay of the judgment, the owner is not in contempt of court if he sells the premises to a third party during the pendency of the appeal. The clause of this section applies when the owner is a defendant and is granted specific performance on his counterclaim for a specific performance as against the purchaser suing for a recovery of his deposit.⁹¹

If the appeal is taken by the owner and he deposits with the clerk a deed, as required by section 597, and the judgment is affirmed, but the deed has become lost, the owner may be required to execute a new instrument.⁹²

4. Action of appellate court.

Under appeal to the Appellate Division that court may reverse or affirm, wholly or partly, or may modify the judgment appealed from.⁹³ It can render such judgment as the parties are equitably entitled to.⁹⁴ The court of Appeals has similar powers on an appeal to that court.⁹⁵ In equity actions an appellate court will look to the entire case, and see whether substantial justice has been done, and when that appears, it will affirm the judgment, notwithstanding the admission of testimony which, in ordinary actions at law, might have necessitated a new trial.⁹⁶ The weight and sufficiency of the evidence tending to establish a contract are open to review in the Appellate Division,⁹⁷ but not in the Court of Appeals.⁹⁸ Although an oral contract, and particularly where it is one for the testamentary disposition of the property of a deceased, must be established by clear

91. *Bloomgarden v. Hoffman*, 116 App. Div. 719, 102 N. Y. Supp. 20.

92. *Worrall v. Munn*, 17 N. Y. 475.

93. Civ. Prac. Act, § 584.

94. *Muck v. Hitchcock*, 149 App. Div. 323, 134 N. Y. Supp. 271.

95. Civ. Prac. Act, § 604. *Woodruff v. Germansky*, 233 N. Y. 365.

96. *Patterson v. Copeland*, 52 How. Pr. 460.

97. *Pickett v. Michaels*, 120 App. Div. 357, 105 N. Y. Supp. 411.

98. *Loddell v. Loddell*, 36 N. Y. 327; *Dunckel v. Dunckel*, 141 N. Y. 427; *Winne v. Winne*, 166 N. Y. 263.

and convincing evidence,⁹⁹ if there is any evidence in support of the alleged contract, and the trial court and the Appellate Division have considered the evidence sufficient, the Court of Appeals will not interfere.¹ Moreover, the Appellate Division is loath to reverse the decision of the Special Term on a question of fact.²

ARTICLE IV.

RELIEF GRANTED.

A. In general.

If a court of equity obtains jurisdiction of an action, it will ordinarily retain jurisdiction until the entire controversy is disposed of.³ In some cases the relief by way of specific performance may be denied, yet the court may retain the action for the purpose of awarding damages as alternative relief.⁴ The relief granted in an action of specific performance will be adapted to exigencies of the case.⁵ Equity moulds its decree upon the facts and circumstances as disclosed in each case at the time of the trial.⁶

If the title is not marketable, the purchaser may have an election of taking the title *as is*, or having the contract rescinded and being placed in *statu quo*.⁷ If there is no dispute as to the existence of an incumbrance, the purchaser may take the title with a deduction of the amount of the

99. See, *supra*, II-N, Contracts for disposition of property of deceased.

1. *Lobdell v. Lobdell*, 36 N. Y. 327; *Winne v. Winne*, 166 N. Y. 263. "One of the prerequisites to the specific performance of a parol agreement for the purchase and sale of land is that the agreement should be clearly proved and certain as to its terms. But that is a rule to be observed and enforced in the equity courts which deal with the facts. When the agreement has there been found upon conflicting evidence, and is certain in its terms as found, it must be taken here as clearly established within the rule, and what was before uncertain has become certain." *Dunckel v. Dunckel*, 141 N. Y. 427.

2. *Van Epps v. Clock*, 7 N. Y. Supp. 21, 25 St. Rep. 896.

3. *Witherbee v. Meyer*, 84 Hun 146, 32 N. Y. Supp. 537, 65 St. Rep. 806, reversed on other grounds, 155 N. Y. 446.

4. See, *infra*, IV-F, Damages in lieu of specific performance.

5. *Witherbee v. Meyer*, 84 Hun 146, 32 N. Y. Supp. 537, 65 St. Rep. 806, reversed on other grounds, 155 N. Y. 446.

6. *Worrall v. Munn*, 38 N. Y. 137; *Bolognino v. Shotland*, 162 App. Div. 679, 147 N. Y. Supp. 981.

7. *Tausk v. Siry*, 110 Misc. 514, 180 N. Y. Supp. 439.

incumbrance, or in some cases with an abatement of the purchase price to correspond to the defect in the title.⁸ An abatement on the purchase price is frequently allowed when the premises are subject to a dower right which the vendor cannot release.⁹ Yet it must be borne in mind that it is the function of the court to enforce, or refuse to enforce, the contract of the parties, not to make for the parties the contract which they might or should have made.¹⁰

The relief granted must, at least substantially, correspond with the cause of action set forth in the complaint and the prayer for relief therein contained.¹¹ But, if the complaint contains allegations which are not vital to a recovery, such as, for example, an allegation of fraud, the failure to prove the unnecessary allegation does not deprive the plaintiff of the remedy.¹²

B. Directions as to specific performance.

1. In general.

In an action by a purchaser to compel the delivery of a deed, it is possible that the decree may be so drawn as to pass title to the premises without the physical act of signing and delivering a deed;¹³ or the sheriff may be authorized to convey the property;¹⁴ but the usual practice is for the decree to direct the execution of the instrument, with a direction for the purchaser to pay the purchase price, if that has not already been done, upon the delivery of the deed.¹⁵ The form of the decree is similar in an action by the vendor, the decree providing for the payment of the purchase price upon the delivery of the deed.¹⁶ The time and place for the performance of these mutually dependent acts may be appropriately fixed by the judgment.¹⁷ The

8. See, *infra*, IV-G, Abatement of purchase price.

9. See, *infra*, IV-K, Vendor's wife refusing to sign deed.

10. *Tausk v. Siry*, 110 Misc. 514, 180 N. Y. Supp. 439.

11. *Taylor v. Taylor*, 43 N. Y. 578; *Gettins v. Boyle*, 184 App. Div. 499, 171 N. Y. Supp. 711.

12. *Ashby v. Fancher*, 187 App. Div. 45, 175 N. Y. Supp. 142.

13. *Korminsky v. Korminsky*, 2 Misc. 138, 21 N. Y. Supp. 611.

14. Civ. Prac. Act, § 979.

15. *Worrall v. Munn*, 17 N. Y. 475; *Clark v. Hall*, 7 Paige 382.

16. *Palmer v. Hudson Valley Ry. Co.*, 134 App. Div. 42, 118 N. Y. Supp. 710; *Lazarus v. Heilman*, 11 Abb. N. C. 93, 2 Civ. Proc. (Browne) 204.

17. *Abel v. Bischoff*, 99 App. Div. 248, 90 N. Y. Supp. 990, modified, 185 N. Y. 568.

Uncertain future time.—Where it appears that the seller is unable to perform because of the pendency of an

decree may provide that, if the purchaser refuses to pay the purchase price, the premises may be sold by a referee, and if the sale fails to produce sufficient to pay the amount due to the vendor, judgment for the deficiency may be entered against the purchaser.¹⁸

Heirs of the seller, or his grantees or successors, may be compelled to perform specifically; but, if the person having the legal title is not a party to the action, specific performance cannot be granted; the remedy, if any, is usually by a judgment for damages.¹⁹ While a party may be compelled to execute certain instruments, he cannot be compelled to secure the execution of an instrument by a third person over whom he has no control.²⁰

2. Form of deed.

Primarily, the obligation of the vendor is to deliver a deed which is in conformity with his contract.²¹ It is not the function of the court to make a new contract for the parties, although the purchaser may not receive the form of deed which may be for his best interests. If the contract contains no provisions requiring covenants in the deed or prescribing the form of the instrument, the vendor is only bound to deliver a deed which is sufficient to pass the title.²² If the contract does not require a warranty deed, the judgment should not require such a deed.²³ If the contract provides that the conveyance shall be subject to certain specified incumbrances or exceptions, a deed subject to other incumbrances or conditions, is not a performance of the contract.²⁴ If the contract is ambiguous as to the deed to be

ejectment action against him, and there is no finding of culpable conduct on his part, a decree for specific performance within twenty days after the final determination of the ejectment action, and fixing the time when such action should be considered as determined, is unauthorized, and a new trial should be granted; if the defect in title continues, the purchaser is entitled to a return of the purchase money, together with such expenses and damages as he may be able to prove; if it disappears, to a decree of specific performance. *Rosenberg v. Haggerty*, 189 N. Y. 481.

18. See, *infra*, IV-I, Judicial sale.

19. *Holden v. Efficient Craftsman Corp.*, 234 N. Y. 437. And see, *supra*, III-A, Parties.

20. *Jerome v. Scudder*, 2 Rob. (25 Super. Ct.) 169.

21. *Bolognino v. Shotland*, 162 App. Div. 679, 147 N. Y. Supp. 981.

22. *Emerick v. Hackett*, 192 N. Y. 162.

23. *Emerick v. Hackett*, 192 N. Y. 162; *Roberts v. Hoberg*, 212 App. Div. 595, 209 N. Y. Supp. 437.

24. *Bolognino v. Shotland*, 162 App. Div. 679, 147 N. Y. Supp. 981.

delivered, it may be construed in the sense in which the vendor knew the purchaser understood it.²⁵ Where a deed is given as security for a loan, and hence is in effect a mortgage, an agreement by the grantee to reconvey the premises by "a good warranty deed and in fee simple," may be satisfied by a deed containing covenants of warranty as to acts of the mortgagee.²⁶

The purchaser is, unless his contract negatives the implication which naturally arises from the contract, entitled to a deed which passes a marketable title. But, if the contract merely contemplates the passing of such title as the vendor has, a quit claim deed of his interest may be sufficient to satisfy the contract.²⁷ On the other hand, if the contract contemplates the passing of a marketable title, the fact that the vendor is willing to give a deed with general covenants of warranty is not sufficient to satisfy the contract, where it appears that his title is imperfect.²⁸

An adult heir who succeeds to the title of a contract vendor, will not be required to give a deed with general warranties, although his ancestor contracted to give such a deed. The obligation of the heir may be fulfilled by a deed containing warranties against his own acts.²⁹

3. Performance by infants or incompetents.

If a vendor becomes incompetent before his contract of sale is performed by him, or if an incompetent receives title to property which is subject to a contract of sale made by his predecessor in title, the committee of the incompetent may be directed to convey the premises to the purchaser. If, perchance, the committee is the person who is entitled to receive the conveyance, the court may appoint a person to make the conveyance in the name of the incompetent.³⁰

25. *Barlow v. Scott*, 24 N. Y. 40, holding that, where the vendor of land undertook to execute such a conveyance as he had received from his grantor, which he said was a warranty deed—the same in fact containing only a covenant against the acts of the grantor—the purchaser, although he saw the deed under which the vendor held, understood it to be, and understood the vendor to promise, a deed

with general warranty, and the vendor knew that such was his understanding, the vendor was bound to convey with general warranty.

26. *Shields v. Russell*, 142 N. Y. 290.

27. *Boyd v. Schlesinger*, 59 N. Y. 301.

28. *Hill v. Ressegieu*, 17 Barb. 162.

29. *Hill v. Ressegieu*, 17 Barb. 162.

30. Civil Practice Act, §§ 1394—1387.

An action of specific performance may be maintained against an infant who has succeeded to the title of a contract vendor.³¹ In such a case, the court may direct the general guardian of the infant's property, or a special guardian appointed in the action, to execute the conveyance, or do any other act which is necessary to carry the judgment into effect.³² Covenants of warranty on the part of the infant will not be required.³³

4. Allowance of offsets against purchase price.

If there is any dispute as to the amount unpaid on the purchase price of premises involved in a suit of specific performance, the court necessarily has the power to determine the question. An offset, either of legal or equitable nature, claimed by the purchaser may be determined and allowed.³⁴ In an action by the vendor, the purchaser may set up as a counterclaim any independent contract claim he may have against the vendor, and the claim may be adjudicated and applied in payment of the purchase price of the premises.³⁵ Or the purchaser may interpose a counterclaim for damages sustained by him through the fraudulent misrepresentations of the vendor, and such damages may be offset against the unpaid purchase money.³⁶

5. Payment or assumption of incumbrances.

An incumbrance upon the premises contracted to be conveyed does not necessarily preclude the specific performance of the contract, even in an action by the vendor.³⁷ Yet, if a decree in specific performance is rendered, the purchaser must be protected in some manner as against the incumbrance.³⁸

As a general rule, a contract to convey land free from incumbrances is not satisfied by the tender of a conveyance, subject to unsatisfied and unpaid incumbrances, although

31. Civil Practice Act, § 1385.

32. Civil Practice Act, § 1387. See also, *VanShaik v. Stuyvesant*, 2 Edw. Ch. 204; *Sutphen v. Fowler*, 9 Paige 280.

33. *Hill v. Ressegieu*, 17 Barb. 162; *Matter of Ellison*, 5 Johns. Ch. 261.

34. *Lazarus v. Heilman*, 11 Abb. N.

C. 93, 2 Civ. Proc. (Browne) 204; *Sutphen v. Fowler*, 9 Paige 280.

35. *Cavalli v. Allen*, 57 N. Y. 508.

36. *Paul v. Swears*, 138 App. Div. 638, 122 N. Y. Supp. 740.

37. *Frain v. Klein*, 19 App. Div. 64, 45 N. Y. Supp. 394.

38. *Frain v. Klein*, 19 App. Div. 64, 45 N. Y. Supp. 394.

they are due and the vendee is permitted to deduct from the purchase money the amount of such incumbrances.³⁹ The purchaser is entitled to a deed conforming to the terms of his contract. But, in many cases if, a lien on the premises is capable of extinguishment by the payment of money and there is no dispute as to the amount required for that purpose, the court may direct the payment of the lien out of the purchase money.⁴⁰ If there is a dispute as to the existence or the amount of a lien, the court, in the absence of the lienor as a party, cannot determine the issue; and, if the purchaser is unwilling to take the title *as is*, he should be allowed to recover his deposit and the expenses of examining title.⁴¹

If the purchaser contracted to assume the payment of certain incumbrances as a part of the consideration, the judgment should direct that the deed contain a clause to that effect. In such a case, the deed does not conform to the contract if it merely states that the premises are conveyed "subject" to the incumbrances.⁴² A purchaser contracting to take a deed subject to certain liens or incumbrances should not be required to take a deed subject to other obligations; nor, if the premises are to be conveyed subject to certain incumbrances, should the vendor be required to convey free from such incumbrances.⁴³

6. Partial performance.

If the vendor is able to perform his contract but partially, as when he is unable to furnish a marketable title to but a part of the premises he contracted to convey, the purchaser cannot be *required* to accept a partial performance, although compensation may be adjusted for the failure of the vendor to make complete performance.⁴⁴ On the other hand, there

39. Webster v. Kings County Trust Co., 145 N. Y. 275.

40. Bostwick v. Beach, 103 N. Y. 414; Webster v. Kings County Trust Co., 145 N. Y. 275; Westervelt v. Matheson, Hoff. Ch. 36; Jerome v. Scudder, 2 Rob. (25 Super. Ct.) 169.

41. Taush v. Siry, 110 Misc., 514, 180 N. Y. Supp. 439.

42. Caldwell v. Croft, 22 Jones & S. (54 Super. Ct.) 523.

43. Caldwell v. Croft, 22 Jones & S. (54 Super. Ct.) 523.

44. Boyd v. Schlesinger, 59 N. Y. 301; Gilbert v. Peteler, 38 Barb. 488, affirmed, 38 N. Y. 165.

Violation of law as to part of premises.—Where a defendant is unable to carry out part of an agreement to lease premises without causing a violation of law and the plaintiff has refused to accept, without that

is authority which *permits* the purchaser in such a case, at his election, to take the partial performance with an abatement of purchase price or other adjustment.⁴⁵ But this, in effect, is the making of a new contract by the court inconsistent with the agreement in the minds of the parties, and the courts should not undertake a judgment in that form.⁴⁶ Only in unusual cases, when all other suggestions for an equitable disposition of the case fail, will a partial performance be decreed.⁴⁷ If the adjustment of the purchase price is but slight so that it is merely an incident, as when there is an outstanding inchoate dower right, this form of remedy may be adopted.⁴⁸ If the contract relates both to real and personal property, the fact that specific performance cannot be decreed as to the personalty does not necessarily preclude that relief as to the personalty.⁴⁹

C. Incidental relief.

A court of equity, having assumed jurisdiction of an action of specific performance and granted the principal relief sought, may grant such further incidental relief as may be necessary to make its decree effective or to accomplish equity between the parties.⁵⁰ Thus, the decree may, in a proper case, determine that a party is entitled to the possession of the premises in question.⁵¹ If, after making the contract in suit, the vendor has conveyed or incumbered the premises and the parties interested are before the court, the instruments affecting the transfer of the title to the plaintiff may be cancelled.⁵² If by reason of mutual mistake of the parties the contract does not correctly express the

part, all of the premises which the defendant agreed to lease, specific performance of the agreement as to the portion plaintiff is willing to accept will not be decreed. *Palombi v. Volpe*, 249 N. Y. 194.

45. *Harsha v. Reid*, 45 N. Y. 415; *Gilbert v. Peteler*, 38 Barb. 488, affirmed, 38 N. Y. 165.

46. *Eickwort v. Powers*, 43 St. Rep. 328, 17 N. Y. Supp. 137.

47. *Eickwort v. Powers*, 43 St. Rep. 328, 17 N. Y. Supp. 137. And see,

infra, IV-G, Abatement of purchase price.

48. See, *infra*, IV-K, Vendor's wife refusing to sign deed.

49. *Hoff v. Daily Graphic, Inc.*, 132 Misc. 597, 230 N. Y. Supp. 350.

50. *Blaisdell v. Spencer*, 124 Misc. 302, 208 N. Y. Supp. 495.

51. *Longo v. Sparano*, 119 Misc. 402, 196 N. Y. Supp. 344.

52. *Livingston v. Painter*, 19 Abb. Pr. 28, 28 How. Pr. 519, 43 Barb. 270; *DePierres v. Thorn*, 4 Bosw. (17 Super. Ct.) 266.

intentions of the parties it may be reformed and enforced as reformed.⁵³

D. Specific performance as incidental relief in another form of action.

In actions where the plaintiff seeks primarily relief not in the nature of specific performance, it may, however, be appropriate to decree the specific performance of an agreement as an incident to the primary relief. Thus, in a judgment creditor's action under section 1192 of the Civil Practice Act to reach the interest of a judgment debtor in a land contract, the final judgment may in some cases direct the specific performance of the contract.⁵⁴ But, in an action at law for the recovery of money damages, the plaintiff will not be allowed judgment for specific performance, although he might have had such relief had he brought his action in equity.⁵⁵ If a purchaser brings an action at law to recover damages on the theory that the vendor's title was unmarketable, he cannot, after the court approves the title, insist that specific performance be decreed.⁵⁶

E. Rescission of contract on denial of relief.

If it appears that the contract in suit is one which cannot be enforced against the defendant, in a proper case, the rescission thereof may be decreed at the request of the defendant.⁵⁷ If, however, the plaintiff has paid any part of the purchase price, the rescission should be granted only on condition of the return of such payment.⁵⁸

F. Damages in lieu of specific performance.

1. In general.

The circumstance that specific performance of the contract cannot be granted in an action brought for that purpose, does not necessarily require the dismissal of the action. If

53. *Keisselbrack v. Livingston*, 4 Johns. Ch. 144.

54. See, *Fiero on Particular Action and Proceedings*. Volume 2, page 1846.

55. *Towle v. Jones*, 1 Rob. (24 Super. Ct.) 87, 19 Abb. Pr. 449.

56. *Steinhardt v. Baker*, 25 App. Div. 197, 49 N. Y. Supp. 357, affirmed, 163 N. Y. 410.

57. *International Paper Co. v. Hudson River Water Power Co.*, 92 App. Div. 56, 86 N. Y. Supp. 736; *Muck v. Hitchcock*, 149 App. Div. 323, 134 N. Y. Supp. 271.

58. *Muck v. Hitchcock*, 149 App. Div. 323, 134 N. Y. Supp. 271.

the plaintiff has sustained a wrong, but for some reason performance of the contract cannot be decreed, the action may be continued to the end that the damages of the plaintiff may be fixed and judgment rendered therefor.⁵⁹ Thus, if the defendant, by conveyance of the premises or otherwise, renders a decree of specific performance impossible, the court in some cases may deny the literal performance and render judgment for damages. The same procedure is followed if it develops that the title which the defendant contracted to convey is not marketable.⁶⁰ Likewise, if the plaintiff apparently has an equitable cause of action, but the relief is denied on the ground that specific performance would be inequitable, equity may award a personal judgment for a sum of money.⁶¹

But where, at the time of the commencement of the action, the plaintiff is aware that equitable relief cannot be granted, the damages will not be determined by the court, but the issues as to the breach of the contract and the amount of damages will be sent to a jury term.⁶² When the plaintiff never had any remedy except at law, his action in equity cannot be continued for the purpose of fixing damages by the court.⁶³ Thus, if the action is upon a contract of a class

59. *Wademan v. Albany & Susquehanna R. Co.*, 51 N. Y. 568; *O'Bierne v. Allegheny & Kinzua R. Co.*, 151 N. Y. 372; *Holden v. Efficient Craftsman Corp.*, 234 N. Y. 437; *Standard Fashion Co. v. Siegel-Cooper Co.*, 44 App. Div. 121, 60 N. Y. Supp. 739; *Levy v. Knepper*, 117 App. Div. 163, 102 N. Y. Supp. 313; *Krasnow v. Topp*, 128 App. Div. 156, 112 N. Y. Supp. 546; *Jennings v. Baumann*, 214 App. Div. 361, 212 N. Y. Supp. 334; *Schorr v. Gervisz*, 39 Misc. 186, 79 N. Y. Supp. 134; *Pitt v. Dairson*, 12 Abb. Pr. 385; *O'Beirne v. Bullis*, 80 Hun 570, 30 N. Y. Supp. 588, 62 St. Rep. 583, affirmed, 151 N. Y. 372; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Lockmann v. Meehan*, 21 N. Y. Supp. 389, 50 St. Rep. 470, affirmed without opinion, 142 N. Y. 666.

60. See the following paragraph.

61. *Margraf v. Muir*, 57 N. Y. 155; *Albany Heights Realty Co. v. Vogt*, 132 App. Div. 736, 169 N. Y. Supp.

1049; *Clarke v. Borough Asphalt Co.*, 93 Misc. 662, 157 N. Y. Supp. 581; *Clarke v. Rochester, etc., R. Co.*, 18 Barb. 350; *Burling v. King*, 66 Barb. 633.

62. *Clarke v. Borough Asphalt Co.*, 93 Misc. 662, 157 N. Y. Supp. 581.

63. *Harsha v. Reid*, 45 N. Y. 415; *Poth v. Washington Square M. E. Church*, 207 App. Div. 219, 201 N. Y. Supp. 776; *Wiswall v. McGown*, 2 Barb. 270, affirmed, 10 N. Y. 465; *Lockman v. Meehan*, 21 N. Y. Supp. 389, 50 St. Rep. 470, affirmed without opinion, 142 N. Y. 666.

Application for jury trial.—If the defendant asks for a jury trial on the ground that the complaint is without equity, but the plaintiff successfully opposes the application, the plaintiff, after a denial of equitable relief, cannot claim that the action should be retained as an action at law for the determination of a jury. *Lockman v.*

not susceptible of specific performance, the complaint should be dismissed for insufficiency.⁶⁴ Or, if the complaint attempts but fails to set forth an equitable cause of action, it has been thought that it does not state any cause of action;⁶⁵ though, when the insufficiency of the complaint is due to a defect in pleading rather than to the absence of a cause of action, if from the complaint a cause of action for damages may be discerned, the action will not be dismissed.⁶⁶ And some authorities apparently take the position that if the sufficiency of the complaint is not questioned until after the trial, the action may be continued as an action at law, though an earlier objection would have resulted in a dismissal.⁶⁷

If equitable relief is denied the plaintiff for some reason which would preclude an action for damages, the action must be dismissed. Thus, if the plaintiff is in default, a refusal to grant relief in equity for that reason will render it impossible to retain the action for the purpose of determining damages.⁶⁸

Damages are not allowed as an alternative for specific performance unless it is first determined that the equitable relief will not be granted.⁶⁹

2. Impossibility of performance.

When a court of equity determines that specific performance of a contract is impossible and hence is required to deny such relief, it nevertheless, in some cases, has the power to retain the action and allow the plaintiff judgment for the damages he has sustained.⁷⁰ Thus, if the vendor has conveyed the premises after making a contract with a purchaser, and the purchaser, in good faith unaware of the

Meehan, 21 N. Y. Supp. 389, 50 St. Rep. 470, affirmed without opinion, 142 N. Y. 666.

64. Kelsey v. Distler, 133 App. Div. 916, 117 N. Y. Supp. 1084.

65. Hollander v. Lustik, 79 Misc. 103, 140 N. Y. Supp. 659.

66. Kelsey v. Distler, 133 App. Div. 916, 117 N. Y. Supp. 1084.

67. Gilbert v. Bunnell, 92 App. Div. 284, 86 N. Y. Supp. 1123.

68. Flanders v. Rosoff, 111 App. Div. 1, 97 N. Y. Supp. 514, affirmed without opinion, 188 N. Y. 616; Chase v.

Hogan, 3 Abb. Pr. N. S. 57, reversing, 6 Bosw. (19 Super. Ct.) 431.

69. Levy v. Knepper, 117 App. Div. 163, 102 N. Y. Supp. 313; Will v. Barnwell, 60 Misc. 458, 112 N. Y. Supp. 462.

70. Barlow v. Scott, 24 N. Y. 40; O'Bierne v. Allegheny & Kinzua R. Co., 151 N. Y. 372; Saperstein v. Mechanics' & Farmers' Sav. Bank, 228 N. Y. 257; Wiswall v. McGown, 2 Barb. 270, affirmed, 10 N. Y. 465; Woodcock v. Bennet, 1 Cow. 711; O'Beirne v. Bullis, 80 Hun 570, 30 N.

conveyance, sues the vendor for specific performance, while the court in the absence of the grantee as a party must decline to decree a conveyance of the premises, it nevertheless may award the plaintiff money damages.⁷¹ The same situation arises where the title of the vendor is unmarketable at the time of the trial.⁷² If, on the other hand, the plaintiff was aware of the impossibility of performance, before he commenced his action for specific performance, there is no equity in his complaint, and the court will grant him no relief.⁷³ But even in the latter case, the action is not necessarily dismissed, for if the complaint contains the allegations essential for an action at law, the action may be retained as such; in which event the issues including the amount of damages are determined by a jury.⁷⁴ The case may be retained for jury trial, although the complaint demands only equitable relief.⁷⁵

3. Jury trial of issues.

If the circumstances are such that the court of equity retains the action as an equitable one for the purpose of adjudging the damages of the plaintiff, there is no right to a jury trial.⁷⁶ If, however, the action, for want of equity, is continued merely as an action at law, the defendant is

Y. Supp. 588, 62 St. Rep. 583, affirmed, 151 N. Y. 372.

71. *Saperstein v. Mechanics' & Farmers' Sav. Bank*, 228 N. Y. 257; *Woodward v. Harris*, 2 Barb. 439; *Morss v. Elmendorf*, 11 Paige 277.

72. *Snow v. Monk*, 81 App. Div. 206, 80 N. Y. Supp. 719; *Krasnow v. Topp*, 128 App. Div. 156, 112 N. Y. Supp. 546; *Reynolds v. Wynne*, 127 App. Div. 69, 111 N. Y. Supp. 248; *McCarten v. Smith*, 163 App. Div. 900, 148 N. Y. Supp. 89; *Schorr v. Gewirz*, 39 Misc. 186, 79 N. Y. Supp. 134; *Messenger v. Chambers*, 53 Misc. 117, 103 N. Y. Supp. 1100; *Schwimmer v. Roth*, 111 Misc. 654, 182 N. Y. Supp. 12; *Giannini v. Foster*, 119 Misc. 343, 196 N. Y. Supp. 247; *Pitt v. Dairson*, 12 Abb. Pr. 385; *Stevenson v. Spratt*, 3 Jones & S. (35 Super. Ct.) 496; *Styles*

v. Blume, 30 N. Y. Supp. 409, 61 St. Rep. 131.

73. *Haffey v. Lynch*, 143 N. Y. 241; *Saperstein v. Mechanics' & Farmers' Sav. Bank*, 228 N. Y. 257; *Doctor v. Reiss*, 180 App. Div. 62, 167 N. Y. Supp. 193; *Messenger v. Chambers*, 53 Misc. 117, 103 N. Y. Supp. 1100; *Stevenson v. Buxton*, 15 Abb. Pr. 352, 37 Barb. 13, reversing, 8 Abb. Pr. 414; *Hatch v. Cobb*, 4 Johns. Ch. 559; *Kempshall v. Stone*, 5 Johns. Ch. 193; *Morss v. Elmendorf*, 11 Paige 277. See also, *Jervis v. Smith*, Hoff. Ch. 470.

74. *Sternberger v. McGovern*, 56 N. Y. 12; *Haffey v. Lynch*, 143 N. Y. 241; *Saperstein v. Mechanics' & Farmers' Sav. Bank*, 228 N. Y. 257.

75. *Doctor v. Reiss*, 180 App. Div. 62, 167 N. Y. Supp. 193.

76. *Krasnow v. Topp*, 128 App. Div. 156, 112 N. Y. Supp. 546.

entitled to a jury trial of the issues. In such a case, the action is transferred from the equity calendar to the jury calendar.⁷⁷ The defendant may, however, waive his right to a jury trial, and in that event the determination of the justice as to the damages may be sustained. If the defendant continues the trial without claiming that the issues should be sent to the jury, he waives the right.⁷⁸

4. Pleading and proof of legal cause of action.

When, after the failure to secure equitable relief, it is claimed that the action should be continued as an action at law, it is essential that the complaint contain the allegations necessary for an action at law. If the complaint does not contain such allegations, the action should be dismissed, not continued for a jury trial.⁷⁹ To recover damages on the theory that the action remains one at law, the complaint must allege, among other things, that the plaintiff has fully performed the conditions of the contract to be performed by him or that the performance thereof has been waived by the defendant.⁸⁰ But, after a trial and a determination that equitable relief shall not be awarded, the court in a proper case may permit the complaint to be amended so as to set forth an action at law.⁸¹ The allowance of amendments, however, is discretionary, and in many cases will be refused.⁸²

The rule may not be so strictly applied when the action is retained as an equitable cause for the fixing of damages, yet it is said that in such a case the damages cannot be

77. *Messenger v. Chambers*, 53 Misc. 117, 103 N. Y. Supp. 1100.

78. *Barlow v. Scott*, 24 N. Y. 40; *Reynolds v. Wynne*, 127 App. Div. 69, 111 N. Y. Supp. 248. See also, *Holden v. Efficient Craftsman Corp.*, 234 N. Y. 437; *Snow v. Monk*, 81 App. Div. 206, 80 N. Y. Supp. 719.

79. *Saperstein v. Mechanics' & Farmers' Sav. Bank*, 228 N. Y. 257; *Bowen v. Webster*, 3 App. Div. 86, 38 N. Y. Supp. 917; *Poth v. Washington Square M. E. Church*, 207 App. Div. 219, 201 N. Y. Supp. 776; *Wilder v. Ranney*, 16 Week. Dig. 478, affirmed, 95 N. Y. 7.

80. *Saperstein v. Mechanics' & Farmers' Sav. Bank*, 228 N. Y. 257.

A formal tender of performance by the plaintiff is not necessary, where the vendor has announced that he will not perform the contract and has placed himself in a position where performance is impossible. *Roberts v. New York L. Ins. Co.*, 195 App. Div. 97, 186 N. Y. Supp. 422, affirmed, 233 N. Y. 639.

81. *Beck v. Allison*, 56 N. Y. 366.

82. *Flanders v. Rosoff*, 111 App. Div. 1, 97 N. Y. Supp. 514, affirmed without opinion, 188 N. Y. 616.

allowed if the complaint does not allege damages and no proof thereof is offered.⁸³ If there is no evidence in the case on which to base a determination of damages, an appellate court may send the case back in order to have this question passed on, but such course is discretionary and will not be followed if the parties do not ask to have the court pass upon that aspect of the case.⁸⁴

5. Amount of damages.

It is laid down, as a general rule, that in case of the breach by a vendor of an executory contract for the sale of land, the vendee can recover only nominal damages,⁸⁵ unless he has paid a part of the purchase price, in which event he can recover the purchase money paid, with interest from the time of payment.⁸⁶ He is also allowed his necessary expenses of title examination, where the contract fails because of defective title of the vendor.⁸⁷ But to this general rule there are some exceptions based upon the wrongful conduct of the vendor, as when he is guilty of fraud or can convey, but will not, either from perverseness or to secure a better bargain; or, if he has contracted to convey when he knew he had no authority to so contract; or, where it is in his power to remedy a defect in his title and he refuses or neglects to do so; or, when he refuses to incur such reasonable expenses as would enable him to fulfill his contract. In all such cases, the vendor is liable to the vendee for the loss of the bargain.⁸⁸ The measure of damages then

83. *Leibowitz v. Bickford's Lunch System*, 241 N. Y. 489; *Bowen v. Webster*, 3 App. Div. 86, 38 N. Y. Supp. 917; *Jurgesen v. Morris*, 194 App. Div. 92, 185 N. Y. Supp. 386.

84. *Leibowitz v. Bickford's Lunch System*, 241 N. Y. 489.

85. *Margraf v. Muir*, 57 N. Y. 155; *Walton v. Meeks*, 120 N. Y. 79; *Ellis v. Salomon*, 57 App. Div. 118, 67 N. Y. Supp. 1025; *Schorr v. Gewirz*, 39 Misc. 186, 79 N. Y. Supp. 134; *Schwimmer v. Roth*, 111 Misc. 654, 182 N. Y. Supp. 12; *Styles v. Blume*, 30 N. Y. Supp. 409, 61 St. Rep. 131.

86. *Margraf v. Muir*, 57 N. Y. 155; *Elliott v. Asiel*, 120 App. Div. 829, 105 N. Y. Supp. 655; *McCarten v. Smith*,

163 App. Div. 900, 148 N. Y. Supp. 89; *Schwimmer v. Roth*, 111 Misc. 654, 182 N. Y. Supp. 12; *Hood v. Cocks*, 78 Hun 253, 28 N. Y. Supp. 952, 60 St. Rep. 229.

87. *Elliott v. Asiel*, 120 App. Div. 829, 105 N. Y. Supp. 655; *Bulkley v. Rouken Glen, Inc.*, 222 App. Div. 570, 226 N. Y. Supp. 544; *Schwimmer v. Roth*, 111 Misc. 654, 182 N. Y. Supp. 12; *Saphir v. Herhlihy*, 131 Misc. 422, 226 N. Y. Supp. 255; *Raynor v. Lyon*, 46 Hun 227, 11 St. Rep. 500, 27 Week. Dig. 278; *Styles v. Blume*, 30 N. Y. Supp. 409, 61 St. Rep. 131.

88. *Margraf v. Muir*, 57 N. Y. 155; *Bulkley v. Rouken Glen*, 222 App. Div. 570, 226 N. Y. Supp. 544; *Schorr v.*

adopted is the difference between the market value of the premises at the time of the breach and the contract price,⁸⁹ to which is added the amount of any part payment with interest, and the expenses of searching the title. This is the rule which is adopted when the vendor is unable to secure the release of the inchoate dower of his wife.⁹⁰ If the entire purchase price has been paid, the purchaser may be entitled to recover the value of the premises at the time of payment with interest from such time.⁹¹ But an allowance of damages for improvements made by the purchaser will not be given, where the improvements were not induced by any fraud, but were made at the risk of the purchaser on the mere consent of the seller.⁹²

6. Recovery of deposit by purchaser.

If the court decides that the vendor's title is unmarketable and hence denies the specific performance, the purchaser may be allowed judgment for any part payment he may have made, with interest from the time of payment, together with his expenses for examining the title.⁹³ Or, if primary relief of specific performance is denied on the ground that the contract has been mutually abandoned, the purchaser may

Gewirz, 39 Misc. 186, 79 N. Y. Supp. 134; Grosso v. Sporer, 123 Misc. 796, 206 N. Y. Supp. 227.

89. Farley v. Secor, 167 App. Div. 80, 152 N. Y. Supp. 787; Bulkley v. Rouken Glen, 222 App. Div. 570, 226 N. Y. Supp. 544; Schorr v. Gewirz, 39 Misc. 186, 79 N. Y. Supp. 134; Grosso v. Sporer, 123 Misc. 796, 206 N. Y. Supp. 227.

Refusal to accept deed of reconveyance.—Under a contract of purchase whereby the vendor agrees, at the option of the purchaser, to accept a reconveyance of the premises within a certain time and to pay to the purchaser a specified price therefor, the measure of damages in case the vendor refuses to accept a reconveyance of the premises is the difference between the actual value of the premises and the price agreed to be paid therefor. The vendee cannot recover the purchase price in an action at law.

Bensinger v. Erhardt, 74 App. Div. 169, 77 N. Y. Supp. 577.

90. Farley v. Secor, 167 App. Div. 80, 152 N. Y. Supp. 787.

91. Giannini v. Foster, 119 Misc. 343, 196 N. Y. Supp. 247.

92. Walton v. Meeks, 120 N. Y. 79; Styles v. Blume, 30 N. Y. Supp. 409, 61 St. Rep. 131.

93. Barnett v. Sussman, 116 App. Div. 859, 102 N. Y. Supp. 287; Muck v. Hitchcock, 149 App. Div. 323, 134 N. Y. Supp. 271; Smith v. Browning, 171 App. Div. 273, 157 N. Y. Supp. 71; Drake v. Gaffney, 183 App. Div. 577, 171 N. Y. Supp. 131; Leinhardt v. Solomon, 57 Misc. 238, 109 N. Y. Supp. 144; Taush v. Siry, 110 Misc. 514, 180 N. Y. Supp. 439; Clark v. Merinsky, 122 Misc. 168, 202 N. Y. Supp. 273; Champlin v. Parish, 3 Edw. Ch. 581; Rose v. Adler, 147 N. Y. Supp. 307, affirmed without opinion, 165 App. Div. 921, 150 N. Y. Supp. 1110.

be granted judgment for the payments he has made.⁹⁴ Or, if during the pendency of an appeal, the vendor conveys the property, the purchaser's deposit must be returned.^{94a} But, if the purchaser is in default in failing to perform the conditions of the contract to be performed by him, he will not be allowed to recover payments made to a vendor who has always been able and willing to convey.⁹⁵ Thus, a vendee, who has refused to accept a deed tendered to him, on the ground that the title is not marketable, is not entitled, when the court holds that the title is marketable, to recover the purchase money paid.⁹⁶ Or, where by his delay the purchaser no longer has a remedy at law, it is thought that he cannot recover his deposit.⁹⁷

7. Lien for damages or deposit.

When, by reason of the unmarketable condition of the vendor's title, specific performance of the contract is denied, but the purchaser has judgment for a part payment or "earnest" money, it is proper for the court to decree that such sum shall be a lien upon interest of the vendor in the premises.⁹⁸ But, when the purchaser is allowed damages computed upon the difference between the value of the premises and the contract price, the court will not impress a lien on the real estate for such damages.⁹⁹

94. *Lese v. Lawson*, 118 App. Div. 254, 103 N. Y. Supp. 303.

94-a. *Cohen v. Realty Co.*, 250 N. Y. 262.

95. *Paige v. McDonald*, 55 N. Y. 99; *Grennel v. Greater New York Development Co.*, 153 App. Div. 362, 138 N. Y. Supp. 511, affirmed without opinion, 214 N. Y. 642; *Rollton Syndicate v. Widlitz*, 219 App. Div. 537, 219 N. Y. Supp. 383; *Moss v. Rubenstein*, 117 Misc. 385, 191 N. Y. Supp. 496; *Kane Co. v. Jaretzki*, 119 Misc. 419, 196 N. Y. Supp. 791; *2409 Broadway Corp. v. Lange*, 128 Misc. 118, 217 N. Y. Supp. 225. See also, *Balleisen v. Schiff*, 121 App. Div. 285, 105 N. Y. Supp. 692.

96. *Steinhardt v. Baker*, 163 N. Y. 411.

97. *Finch v. Parker*, 49 N. Y. 1.

98. *Elterman v. Hyman*, 192 N. Y.

113; *Holden v. Efficient Craftsman Corp.*, 234 N. Y. 437; *Elterman v. Hyman*, 141 App. Div. 208, 126 N. Y. Supp. 6; *Muck v. Hitchcock*, 149 App. Div. 323, 134 N. Y. Supp. 271; *VanderBent v. Gilling*, 158 App. Div. 687, 143 N. Y. Supp. 1082; *Stevenson v. Spratt*, 3 Jones & S. (35 Super. Ct.) 496.

Improvements.—Where vendees were in possession of the premises and made improvements in accordance with their contract which required certain expenditures as a condition to entitle them to a deed, it was held that, the vendor being unable to convey a good title, the vendees were entitled to an equitable lien on the premises for the money expended in such improvements. *Gilbert v. Peteler*, 38 N. Y. 165.

99. *Holden v. Efficient Craftsman*

G. Abatement of purchase price.

1. In suit by purchaser.

Under the circumstances of some cases where there is a defect in the title of the premises contracted to be conveyed, but nevertheless a substantial interest in the premises can be conveyed, equity may solve the difficulty by decreeing the conveyance of all the interest of the vendor with an abatement of the purchase price to correspond with failure of the purchaser to receive a perfect title.¹ The purchaser, however, if he insists, is entitled to a marketable title, and such a solution cannot be thrust upon him against his protest. Equity accords him an option. He can refuse to accept the title of the vendor and recover damages, or in the cases under consideration he can accept such title as can be furnished and the courts of equity can fix a smaller purchase price. Obviously there are limitations to such a doctrine. A court of equity should not place itself in a position where it can be charged with making a new contract for the parties instead of enforcing the agreement they made.² And the court should not undertake the task of measuring the defect in title by the medium of money and in deducting such money from the purchase price, unless the defect is one which is fairly susceptible of such measure-

Corp., 234 N. Y. 437; *Stevenson v. Spratt*, 3 Jones & S. (35 Super. Ct.) 496.

1. *Morrison v. Bauer*, 4 St. Rep. 701, 26 Week. Dig. 40.

Abatement for misrepresentation.—The plaintiff, who agreed to purchase property from the defendant, has brought this action to compel specific performance and for an abatement of the purchase price on the ground that the defendant misrepresented the amount of rentals received from the premises. The complaint does not contain any allegations of scienter or of reliance by the plaintiff on the alleged false representations which are essential to a recovery of damages. Therefore, the plaintiff is not entitled to an abatement on the purchase price, for he cannot accomplish in equity by

indirection what he could not accomplish in an action at law. *Radel v. 134 W. 25th St. Bldg. Corp.*, 122 App. Div. 617, 226 N. Y. Supp. 560.

2. *Levy v. Hill*, 50 App. Div. 294, 63 N. Y. Supp. 1002, affirmed without opinion, 174 N. Y. 536; *Sokolski v. Bittenwieser*, 96 App. Div. 18, 88 N. Y. Supp. 973, affirmed without opinion, 183 N. Y. 557; *Sabriski v. Veloski*, 25 Abb. N. C. 185, 11 N. Y. Supp. 668.

Repairs.—The English courts have allowed a deduction of the purchase price to cover repairs to the premises which the vendor agreed to make, but the doctrine of the English cases has not been adopted in this state. *Sokolski v. Bittenwieser*, 96 App. Div. 18, 88 N. Y. Supp. 973, affirmed without opinion, 183 N. Y. 557.

ment.³ Moreover, the purchaser must not bring his suit with the abatement in purchase price as the primary relief sought, for an action cannot be maintained by a purchaser who sets up the defective title and asks specifically that the court determine the amount the purchase price shall be reduced as a condition for his acceptance of the title.⁴

A decree with an abatement of purchase price is justified when the defect is an outstanding dower interest, which, with the aid of mortality tables, is easily reduced to money.⁵ Likewise this procedure may be followed when there are liens on the premises which can be determined and paid.⁶ In at least one case the courts have gone so far as to apply that form of relief where the buildings on the premises were damaged by fire after the making of the contract but before the closing of the title.⁷ On the other hand, it has been held that relief of this nature will not be granted in a case where the vendor agreed to convey several lots, but fails to furnish a title to one or more,⁸ though decisions may be found indicating a contrary view under such circumstances.⁹ Likewise, such relief has been denied where the dimensions of the defendant's premises do not correspond to the survey thereof.¹⁰

2. In suit by vendor.

The doctrine permitting an abatement of purchase price, as explained in the foregoing paragraph allows the purchaser to secure such relief, although the defect in title may be substantial. Similar relief is sometimes accorded to a seller if the defect is *not* substantial. If the defect is of a trivial nature, but possibly causing some slight damage to the purchaser, equity does not deny relief on behalf of the vendor, but may grant specific performance with an allowance on the purchase price sufficient to reimburse the pur-

3. *Sternberger v. McGovern*, 56 N. Y. 12.

4. *Levy v. Hill*, 50 App. Div. 294, 63 N. Y. Supp. 1002, affirmed without opinion, 174 N. Y. 536; *Leerburger v. Watson*, 75 Misc. 3, 134 N. Y. Supp. 818.

5. See, *infra*, IV-K, Vendor's wife refusing to sign deed.

6. See, *supra*, IV-B-5, Payment or assumption of incumbrances.

7. *Polisiuk v. Mayers*, 205 App. Div. 573, 200 N. Y. Supp. 97.

8. *Boyd v. Schlesinger*, 59 N. Y. 301.

9. *Gilbert v. Peteler*, 38 Barb. 438, affirmed, 38 N. Y. 165; *Allerton v. Johnson*, 3 Sandf. Ch. 72.

10. *Sabriski v. Veloski*, 25 Abb. N. C. 185, 11 N. Y. Supp. 668.

chaser for the defect.¹¹ To render a decree along such lines of relief, the defect must be of such a character that it can be the subject of compensation, and must be one which would not have caused the purchaser to decline to enter into the contract had he known the situation at the time of his purchase.¹²

Equity has compelled a purchaser to accept title, although the buildings of an adjoining owner encroached slightly on the premises, a reasonable compensation being made to the purchaser for the deficiency of land.¹³ Similarly, compensation has been allowed, though perhaps the particular decision is unsound, where there was a deficiency in area of the premises.¹⁴ Likewise, it has been suggested that relief could be permitted where fixtures of a determinable value were removed from the premises.¹⁵ On the other hand, where a person contracts to purchase an entire property, and the title to a part of the same is found defective, he cannot be compelled to take that portion only to which the title can be good, even though proportionate compensation is allowed for the part in respect to which the title is found to be defective.¹⁶

H. Accounting for damages sustained from delay.

1. In general.

Where, on account of the pendency of the action, the performance of the contract has been delayed, it is appropriate that the court should determine and provide in the decree for the damages thereby sustained by the parties.¹⁷ So far as possible the court will place the parties in the same position as if the contract had been performed at the agreed

11. *Beyer v. Marks*, 2 Sweeny (32 Super. Ct.) 715. "While it is a familiar principle in a case of deficiency in the quantity of land agreed to be sold that the vendee may seek specific performance with an abatement in the price for the deficiency, the doctrine is also well established, although less frequently invoked, that a vendee may be compelled to perform and accept compensation as an indemnity against defects which are of small importance and not material to the purchaser's

enjoyment of the property." *Sauter v. Frank*, 67 Misc. 657, 124 N. Y. Supp. 802.

12. *Beyer v. Marks*, 2 Sweeny (12 Super. Ct.) 715.

13. *Sauter v. Frank*, 67 Misc. 657, 124 N. Y. Supp. 802.

14. *Voorhees v. DeMeyer*, 2 Barb. 37, affirming, 3 Sandf. Ch. 614.

15. *Smyth v. Sturges*, 108 N. Y. 495.

16. *Gilbert v. Peteler*, 38 N. Y. 165.

17. *Benson v. Tilton*, 24 How. Pr. 494, affirmed, 41 N. Y. 619.

time.¹⁸ The court may decree the performance as of the date of the judgment,¹⁹ or as of the time when a deed conveying a marketable title was tendered to the purchaser,²⁰ with allowances to either or both parties to compensate them for the delay. The vendor may be regarded as a trustee of the land for the benefit of the purchaser and liable to account to him for the rents and profits or for the value of the use and occupation,²¹ and the purchaser may be regarded as a trustee of the purchase money and be charged with interest thereon.²²

2. Value of use and occupancy.

Where a decree of specific performance is made at the suit of the purchaser, it is within the power of the court to give full and complete relief, by awarding to the plaintiff, not only the conveyance to which he is entitled, but also the damages he has sustained through the failure or delay of the defendant to perform his contract.²³ It is the general rule that the vendor shall account to the purchaser for the rents and profits of the premises, or, if the vendor has been in actual possession of the premises, with the value of the use.²⁴ From this sum may be deducted such taxes as have in the *interim* been paid by the vendor,²⁵ interest on the

Expenses of vendor.—If the purchaser unreasonably refuses to accept title, the vendor may recover as damages his expenses in securing a new loan which became necessary on account of the purchaser's acts. *Cogswell v. Boehm*, 5 N. Y. Supp. 67.

18. *Worrall v. Munn*, 38 N. Y. 137; *Bostwick v. Beach*, 105 N. Y. 661.

19. *Pakas v. Clarke*, 136 App. Div. 492, 121 N. Y. Supp. 192, affirmed without opinion, 203 N. Y. 534.

20. *Begen v. Pettus*, 223 N. Y. 662.

21. *Worrall v. Munn*, 38 N. Y. 137; *Bostwick v. Beach*, 105 N. Y. 611; *Morss v. Elmendorf*, 11 Paige 277. And see the following paragraph.

22. *Worrall v. Munn*, 38 N. Y. 137; *Bostwick v. Beach*, 105 N. Y. 661. And see, *infra*, 3, Interest to vendor.

23. *Worrall v. Munn*, 38 N. Y. 137; *Taylor v. Taylor*, 43 N. Y. 578.

24. *Worrall v. Munn*, 38 N. Y. 137; *Bostwick v. Beach*, 103 N. Y. 414; *Bennet v. Bennet*, 10 App. Div. 550, 42 N. Y. Supp. 435; *Lazarus v. Heilman*, 11 Abb. N. C. 93, 2 Civ. Proc. 204; *Losee v. Morey*, 57 Barb. 561; *Radford v. Wilson*, 2 Bosw. (15 Super. Ct.) 237; *Selleck v. Tallman*, 11 Daly 141; affirmed, 87 N. Y. 106; *Benson v. Tilton*, 24 How. Pr. 494, affirmed, 41 N. Y. 619; *Morrison v. Bauer*, 4 St. Rep. 701, 26 Week. Dig. 40.

Necessity of proof.—A judgment for the reasonable value of the premises cannot be sustained where there are no admissions in the pleadings or proof upon the trial to justify the finding of value. *Raby v. Greater N. Y. Development Co.*, 151 App. Div. 72, 135 N. Y. Supp. 813, affirmed without opinion, 210 N. Y. 586.

25. *Duffy v. Donovan*, 52 N. Y. 634;

unpaid purchase money,²⁶ or interest on incumbrances which the purchaser agreed to assume.²⁷ But this is not an inflexible method of determining the damages; and a court of equity may regard the special circumstances of a particular case, whenever there are any peculiarities which render the rigid application of the general rule unsatisfactory.²⁸ If the premises are unoccupied and unproductive, the court, in its discretion may relieve the vendor from accounting to the purchaser for the use thereof, provided the purchaser is relieved from paying interest on the unpaid purchase price.²⁹ Or a successful purchaser may have the option of taking the rents and profits and paying interest, or of relinquishing the rents and profits and receiving exemption from the interest.³⁰

3. Interest to vendor.

If through the delay of the purchaser the vendor has lost the use of the purchase price, it is equitable that he should receive an allowance of interest.³¹ Or, if the action is by the purchaser, he may be charged with the interest on the unpaid purchase money, as an offset to a charge made against the vendor for use and occupation.³² On the other hand, if the vendor is in default and the purchaser has always been ready to pay the purchase price, he may in some cases be excused from the payment of interest,³³ though if

Lazarus v. Heilman, 11 Abb. N. C. 93, 2 Civ. Proc. 204; *Radford v. Wilson*, 2 Bosw. (15 Super. Ct.) 237; *Selbeck v. Tallman*, 11 Daly 141, affirmed, 87 N. Y. 106; *Benson v. Tilton*, 24 How. Pr. 494, affirmed, 41 N. Y. 619.

26. See the following paragraph.

27. *Duffy v. Donovan*, 52 N. Y. 634; *Lazarus v. Heilman*, 11 Abb. N. C. 93, 2 Civ. Proc. 204. See also, *Caldwell v. Craft*, 22 Jones & S. (54 Super. Ct.) 523.

28. *Worrall v. Munn*, 38 N. Y. 137.

29. *Haffey v. Lynch*, 193 N. Y. 67.

30. *Merchants Bank v. Thompson*, 55 N. Y. 7; *Radford v. Wilson*, 2 Bosw. (15 Super. Ct.) 237.

31. *Bostwick v. Beach*, 105 N. Y. 661; *Morrison v. Bauer*, 4 St. Rep. 701, 26 Week. Dig. 40.

32. *Bostwick v. Beach*, 103 N. Y. 414; *Lazarus v. Heilman*, 11 Abb. N. C. 93, 2 Civ. Proc. 204; *Radford v. Wilson*, 2 Bosw. (15 Super. Ct.) 237; *Selleck v. Tallman*, 11 Daly 141, affirmed, 87 N. Y. 106.

33. *Worrall v. Munn*, 38 N. Y. 137; *Merchants Bank v. Thompson*, 55 N. Y. 7; *Bostwick v. Beach*, 103 N. Y. 414; *Abel v. Bischoff*, 99 App. Div. 248, 90 N. Y. Supp. 990, modified, 185 N. Y. 568; *Selbeck v. Tallman*, 11 Daly 141, affirmed, 87 N. Y. 106.

Deposit of purchase price in bank.—If, on the failure of the vendor to deliver title on the law day, the purchaser places the unpaid purchase money in a bank, subject to the order of the vendor, and notifies the vendor of the deposit, the purchaser is not

he has received benefit from the money in his hands he may be charged with interest.³⁴ If the purchaser has been in actual possession of the premises, he will be required to pay interest on the purchase price, although the land is not productive, so long as his possession is not disturbed and the vendor is not in default.³⁵

If the agreement in controversy is for the exchange of properties, equity may be satisfied by charging neither party for interest or for use.³⁶

4. Interest to purchaser.

Ordinarily the purchaser's damages for delay may be satisfied by allowing him the value of the use of the premises during the period he was kept out of possession, but in a particular case, his damages may be otherwise measured. Thus, he may be allowed the interest on the payments he has made.³⁷ And, when he is allowed damages for use of the property or for depreciation in its value, he may be allowed the interest on such damages.³⁸

5. Depreciation in property.

A party agreeing to sell and convey premises at a future day does not, in the absence of stipulation to that effect, owe the vendee any duty to keep them in good repair, or to guard against the decay which is due to time and ordinary use.³⁹ The damages sustained through failure to receive possession are ordinarily measured by the rents and profits of the property, and damages for depreciation are deemed too speculative for allowance.⁴⁰ A different rule may be adopted where the contract relates to property which naturally depreciates in value from lapse of time, such as a leasehold.⁴¹ Or, if the depreciation is not a natural result of the inroads of time, but is occasioned through the mis-

chargeable with interest thereon.
Bostwick v. Beach, 103 N. Y. 414.

34. Bostwick v. Beach, 103 N. Y. 414.

35. Stevenson v. Maxwell, 2 N. Y. 408; Cleveland v. Burrell, 25 Barb. 532.

36. Broeck v. Livingston, 1 Johns. Ch. 357.

37. Worrall v. Munn, 38 N. Y. 137; Pierce v. Nichols, 1 Paige 244.

38. Worrall v. Munn, 38 N. Y. 137.

39. Hellreigel v. Manning, 97 N. Y. 56.

40. Benson v. Tilton, 24 How. Pr. 494, affirmed, 41 N. Y. 619.

41. Radford v. Wilson, 2 Bosw. (15 Super. Ct.) 237; Benson v. Tilton, 24 How. Pr. 494, affirmed, 41 N. Y. 619.

management or neglect of the vendor, his position as a trustee of the property for the benefit of the purchaser renders him chargeable with damages so caused.⁴²

The fact that the premises have increased in value during the time the purchaser has been delayed in securing a deed, does not avail the vendor in fixing the damages to be awarded to the purchaser.⁴³

6. Accounting by purchaser for use of premises.

If the vendee has been in possession of the premises and he successfully resists an action by the vendor for specific performance, he will be required to account to the vendor for the profits of the premises during his period of occupation.⁴⁴

7. Accounting for proceeds of sale to third person.

A vendor, who in bad faith sells the premises to a third person and hence succeeds in defeating the purchaser's action for specific performance, may be required to account to the purchaser for the proceeds of the sale.⁴⁵ Where a person, otherwise entitled to a decree of specific performance of an agreement to convey lands in consideration of care rendered to the owner during her lifetime, makes no claim upon her executor for more than six months after the probate of her will devising the lands to other persons, and the devisees have conveyed the lands to *bona fide* purchasers, equity cannot decree a specific performance, but as a substitute therefor will require the devisee to refund the consideration received for the conveyance and, if there be a balance still remaining due the promisee, it should be adjusted upon equitable principles.⁴⁶

I. Judicial sale.

The purchaser of real estate, in case the vendor fails to furnish a marketable title to the premises, may be granted

42. Worrall v. Munn, 38 N. Y. 137; Bostwick v. Beach, 105 N. Y. 661.

43. Radford v. Wilson, 2 Bosw. (15 Super. Ct.) 237; Selleck v. Tallman, 11 Daly 141, affirmed, 87 N. Y. 106.

44. Mathewson v. Geer, 210 App. Div. 160, 205 N. Y. Supp. 451.

45. Barnett v. Sussman, 116 App. Div. 859, 102 N. Y. Supp. 237; Barnett v. Sussman, 116 App. Div. 859, 102 N. Y. Supp. 287.

46. Lasher v. McDermott, 144 App. Div. 843, 129 N. Y. Supp. 416, affirmed without opinion, 205 N. Y. 558.

a judgment for his deposit or part payment of the purchase price. The court may decree that the purchaser have a lien therefor on the interest of the vendor,⁴⁷ and the judgment may contain appropriate directions for the foreclosure of such lien by a judicial sale of the vendor's interest.⁴⁸

If the contract vendee has paid part of the purchase price of the premises and then defaulted, the interest which the vendee has thereby acquired in the premises will not be forfeited on account of his default.⁴⁹ The proper practice is to direct the purchaser to pay the unpaid purchase price within a certain time upon the delivery to him of a deed; and, if he fails to make such payment, then the premises shall be sold at public auction by a referee appointed by the court, who will pay to the vendor such sums as may be due to him under the judgment, the surplus, if any, to be paid into court. In other words, the practice is similar to that adopted in a mortgage foreclosure.⁵⁰ If the sale results in a deficiency, the vendor may have personal judgment therefor against the purchaser.⁵¹

J. Injunction.

Although a court of equity may be unable to compel the specific performance of an agreement requiring the performance of continuous acts,⁵² if the contract contains negative covenants, it may restrain the breach of those covenants.⁵³

K. Vendor's wife refusing to sign deed.

If the wife of the vendor refuses to join in his deed and release her inchoate right of dower, the purchaser cannot

47. See, *supra*, IV-F-7, Lien for damages or deposit.

48. *Benedict v. Benedict*, 85 N. Y. 625; *Muck v. Hitchcock*, 149 App. Div. 323, 134 N. Y. Supp. 271; *Price v. Palmer*, 23 Hun 504.

49. *Abel v. Bischoff*, 99 App. Div. 248, 90 N. Y. Supp. 990, modified, 185 N. Y. 568. In an early case it was held that the decree could provide that if the vendee did not pay the purchase money within such time as he was directed by the court, he was barred of his right to a specific performance

of the contract. *Clark v. Hall*, 7 Paige 382.

50. *Strauss v. Bendheim*, 162 N. Y. 469; *Biden v. James*, 3 St. Rep. 734, 25 Week. Dig. 141, affirmed without opinion, 111 N. Y. 680.

51. *Strauss v. Bendheim*, 162 N. Y. 469.

52. See, *supra*, II-R, Contracts for continuous acts.

53. *Standard Fashion Co. v. Siegel-Cooper Co.*, 30 App. Div. 564, 52 N. Y. Supp. 433, affirmed, 157 N. Y. 60.

be compelled to accept the conveyance.⁵⁴ If the wife has signed the contract of sale, there is no difficulty, for a decree can be made which is equally binding on both husband and wife.⁵⁵ But, if the wife has not joined in her husband's contract of sale, she is not a proper party in an action by the purchaser to enforce the contract, and cannot be bound by any decree made therein.⁵⁶ Formerly in such cases the court would coerce the wife by imprisoning the husband until she consented to join in his deed.⁵⁷ Now, the purchaser is accorded an election of remedies. He may maintain an action of specific performance against the vendor to compel the conveyance of the vendor's interest with an abatement of the purchase price to the extent of the value of the wife's inchoate right of dower.⁵⁸ Or, he may reject the purchase, *in toto*, and recover damages,⁵⁹ the measure of damages in such a case being the difference between the value of the premises and the contract price,⁶⁰ together with

54. See, *supra*, II-Y-9, Title of vendor not marketable.

55. See, *Bostwick v. Beach*, 103 N. Y. 414.

56. *Feldman v. Lisansky*, 239 N. Y. 81; *Maas v. Morgenthau*, 136 App. Div. 359, 120 N. Y. Supp. 1004; *Campione v. Eckert*, 110 Misc. 703, 182 N. Y. Supp. 137.

Question not arising.—Where it does not appear from the record that the wife of the vendor will not join in his deed, an appellate court will not assume that she will not do so. *Schoonmaker v. Bonnie*, 119 N. Y. 565; *Northrup v. Gibbs*, 1 N. Y. Supp. 465, 17 St. Rep. 320, 28 Week. Dig. 505.

57. *Weintraub v. Kruse*, 195 App. Div. 807, 187 N. Y. Supp. 713.

58. *Feldman v. Lisansky*, 239 N. Y. 81; *Walter v. Laidlaw*, 249 N. Y. 46; *Maas v. Morgenthau*, 136 App. Div. 359, 120 N. Y. Supp. 1004; *Farley v. Secor*, 167 App. Div. 80, 152 N. Y. Supp. 787; *Weintraub v. Kruse*, 195 App. Div. 807, 187 N. Y. Supp. 713; *Campione v. Eckert*, 110 Misc. 703, 182 N. Y. Supp. 137; *Lewis v. Ludlum*, 115 Misc. 347, 189 N. Y. Supp. 636, affirmed, 204 App. Div. 889, 197 N. Y.

Supp. 926; *Kupferberg v. Beatty*, 122 Misc. 217, 202 N. Y. Supp. 712. Compare the earlier cases of *Sternberger v. McGovern*, 56 N. Y. 12; *Dixon v. Rice*, 16 Hun 422; *Martin v. Colby*, 42 Hun 1, 3 St. Rep. 415, 25 Week. Dig. 358; *Roos v. Lockwood*, 59 Hun 181, 13 N. Y. Supp. 128, 37 St. Rep. 182; *Bonnet v. Babbage*, 19 N. Y. Supp. 934, refusing relief in this form.

Consummate dower.—The same rule can be applied when the outstanding dower is a consummate right. *Bostwick v. Beach*, 103 N. Y. 414.

Personal judgment.—If there is no unpaid money due the vendor, the vendee may have personal judgment against the vendor for the value of the unextinguished dower right computed in the usual way. *Walter v. Laidlaw*, 249 N. Y. 46.

59. *Maas v. Morgenthau*, 136 App. Div. 359, 120 N. Y. Supp. 1004; *Weintraub v. Kruse*, 195 App. Div. 807, 187 N. Y. Supp. 713; *Kupferberg v. Beatty*, 122 Misc. 217, 202 N. Y. Supp. 712.

60. *Farley v. Secor*, 167 App. Div. 80, 152 N. Y. Supp. 787.

any deposit or part payment he may have made. Or, if the purchaser did not discover the unwillingness of the wife until after the commencement of the suit, he can be allowed to discontinue without costs and without prejudice to an action at law for damages.⁶¹

If the purchaser elects to take the premises with abatement of purchase price, he should prove the age of the wife, in order that there may be a definite final judgment.⁶² If the husband is living at the time of the decree, the value to be deducted is the gross value of an inchoate right, not a consummate, right of dower.⁶³

L. Enforcement of decree.

A judgment in an action of specific performance, so far as it requires the execution and delivery of a deed by the vendor, or the performance of specific acts by the purchaser, is enforced under section 505 of the Civil Practice Act, by punishing the vendor for a contempt of court.⁶⁴ Financial inability to comply with the decree is no defense to a contempt proceeding, relief in such cases being granted under section 775 of the Judiciary Law as a matter of discretion.⁶⁵ But one cannot be punished in contempt proceedings for a failure to comply with a judgment of the court, unless the failure is established with reasonable certainty.⁶⁶

Adequate relief may be secured in some cases by the insertion in the judgment of a direction to the sheriff to convey the property to the plaintiff.⁶⁷

So far as the judgment allows money damages to the purchaser as against the vendor, it cannot be enforced in this manner, but must be enforced by execution.⁶⁸ Similarly, that part of the judgment which requires the purchaser to pay the purchase price can be enforced only by execution.⁶⁹

61. *Maas v. Morgenthauer*, 136 App. Div. 359, 120 N. Y. Supp. 1004.

62. *Weintraub v. Kruse*, 195 App. Div. 807, 187 N. Y. Supp. 713.

63. *Kupferberg v. Beatty*, 122 Misc. 217, 202 N. Y. Supp. 712.

64. *Elder v. Taylor*, 211 App. Div. 682, 208 N. Y. Supp. 321. See the Chapter on Contempt in Fiero on Particular Actions and Proceedings, as to proceedings to punish a person for contempt of court.

65. *Elder v. Taylor*, 211 App. Div. 682, 208 N. Y. Supp. 321.

66. *Greenberg v. Polansky*, 140 App. Div. 326, 125 N. Y. Supp. 176.

67. Civ. Prac. Act, § 979; *Garfein v. McInnis*, 248 N. Y. 261.

68. *Pitt v. Davison*, 12 Abb. Pr. 385.

69. *Leerburger v. Watson*, 169 App. Div. 48, 154 N. Y. Supp. 577; *Kittel v. Stueve*, 11 Misc. 279, 24 Civ. Proc. 223, 32 N. Y. Supp. 272, 65 St. Rep.

M. Modification of decree.

Defects or irregularities in a judgment may be corrected.⁷⁰ It may be corrected or amended on motion as to mere clerical errors, or by the insertion of a provision or direction which would have been inserted as a matter of course if suggested as a necessary or proper clause to carry into effect the decision of the court.⁷¹ And a modification of the judgment which does not affect the substance thereof, such as a change in respect to the time the required acts are to be performed, may be allowed.⁷² But a modification which affects the substance of the judgment should not be granted without a rehearing.⁷³ And it has been held that after the plaintiff has been granted a specific performance of the contract, the court will not grant a supplementary interlocutory judgment allowing him damages in lieu of specific performance.⁷⁴

N. Costs.

The costs in an equitable action of specific performance are governed by section 1477 of the Civil Practice Act, and are discretionary, the court being authorized to award costs to any party in such sum, not exceeding the total amount authorized by statute, as to the court may seem just.⁷⁵ If both parties are in the wrong, the decree may be without costs to either.⁷⁶

Costs may be denied as against a plaintiff acting in good faith, but who is unsuccessful in his action, because the court finds that the contract is too uncertain for enforcement in the action.⁷⁷ Indeed, the defendant may be directed to pay costs to the plaintiff where a successful defense was conducted upon technicalities, not on the merits.⁷⁸ Where

447, affirmed without opinion, 146 N. Y. 380; *Weissenburger v. Williams*, 81 Misc. 397, 142 N. Y. Supp. 1027.

70. See Civil Practice Act, §§ 105, 109.

71. *Pitt v. Davison*, 12 Abb. Pr. 385; *Clark v. Hall*, 7 Paige 382.

72. *Adams v. Ash*, 46 Hun 105, 11 Rep. 618.

73. *Clark v. Hall*, 7 Paige 382.

74. *Koehler v. Brady*, 87 App. Div. 326, 84 N. Y. Supp. 457, affirmed without opinion, 181 N. Y. 503.

75. *Bruce v. Tilson*, 25 N. Y. 194; *Nanny v. Fancher*, 15 N. Y. Supp. 628.

Disbursements.—An item for recording the contract of sale is not a taxable disbursement. *Brisach v. Vosseler*, 111 Misc. 424, 181 N. Y. Supp. 571.

76. *Hill v. Ressegieu*, 17 Barb. 162; *Scott v. Thorp*, 4 Edw. Ch. 1.

77. *Kayser v. Arnold*, 1 N. Y. Supp. 412, 16 St. Rep. 105, affirmed, 124 N. Y. 674.

78. *General Railway, etc., Co. v.*

the court refuses to direct the specific performance of a contract, but allows the action to be continued to enable the plaintiff to recover damages for a breach of the contract, it will not require him to pay to the defendant the costs and disbursements incurred in the proceedings to compel a specific performance.⁷⁹

A defeated defendant may be relieved, in the discretion of the court, from the payment of costs to his adversary. A failure of the plaintiff to make a tender or a demand for performance before the institution of the suit, may be considered on the question of costs.⁸⁰ A plaintiff who hastily precipitates the litigation may not be awarded costs.⁸¹ If the vendor does not have a marketable title at the time of the commencement of the action but later perfects it so that he is entitled to a decree against the purchaser, the latter will not ordinarily be charged with costs.⁸²

Where the vendor has died, and the action is against his infant heir, the costs of the guardian *ad litem* should be paid by the plaintiff,⁸³ unless the guardian has acted improperly.⁸⁴ Or, if the heir is an incompetent person, costs will not be charged against him.⁸⁵

An action for specific performance is not an action "to compel the determination of a claim to real property" within the meaning of section 1512 of the Civil Practice Act, and an additional allowance will not be made to the plaintiff under that section.⁸⁶ But the action may be "a difficult or extraordinary case" within the meaning of section 1513, so that additional costs may be allowed under that section.⁸⁷

Cade, 122 App. Div. 106, 106 N. Y. Supp. 729.

79. Fitzpatrick v. Dorland, 27 Hun 291.

80. Bruce v. Tilson, 25 N. Y. 194; Swartout v. Burr, 1 Barb. 495; Kerr v. Purdy, 50 Barb. 24.

81. Baumeister v. Demuth, 84 App. Div. 394, 82 N. Y. Supp. 831, affirmed without opinion, 178 N. Y. 630.

82. Pangburn v. Miles, 10 Abb. N. C. 42.

83. Sutphen v. Fowler, 9 Paige 280.

84. Hill v. Ressegieu, 17 Barb. 162.

85. Swartout v. Burr, 1 Barb. 495.

86. Brisach v. Vosseler, 111 Misc. 424, 181 N. Y. Supp. 571.

87. Quinn v. Quinn, 69 App. Div. 598, 75 N. Y. Supp. 83; General Railway, etc., Co. v. Cade, 122 App. Div. 106, 106 N. Y. Supp. 729.

O. Forms of judgments.**1. Judgment in action by vendor of real estate.⁸⁸**

LINCOLN TRUST COMPANY, as Sole Surviving Substituted Trustee, under the Last Will and Testa- ment of Mary G. Pinkney, for the benefit of Julia Morris Cur- tiss Lawrence, WILLIAMS BUILDING CORPORATION, Defendant.	Plaintiff, <i>vs.</i>
--	------------------------------

The issues in the above-entitled action having duly come on to be tried at a Special Term, Part VI, of this Court, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 21st day of June, 1917, before Mr. Justice Henry D. Hotchkiss, and the plaintiff appearing by Joseph M. Proskauer, Esq., its counsel, and the defendant appearing by Charles C. Peters, Esq., its counsel, and the Court having heard the allegations, proofs and arguments of the parties, and after due deliberation, having duly made and filed its decision in writing, in favor of the plaintiff and against the defendant, stating separately the facts found and the conclusions of law, and directing judgment as hereinafter stated, with costs to the plaintiff herein, and the costs of the plaintiff having been duly adjusted by the Clerk of this Court at the sum of seventy-seven and 08/100 (\$77.08) dollars, it is

On motion of Elkus, Gleason & Proskauer, attorneys for the plaintiff herein, hereby

Ordered, Adjudged and Decreed:

1. That the defendant specifically perform said agreement entered into on or about the 21st day of August, 1917, as of the 25th day of October, 1916, and pay to the plaintiff herein the balance of the purchase price thereof, namely three thousand dollars (\$3,000) with interest thereon from the 25th day of October, 1916, to the date of the tender, by the plaintiff, hereinafter mentioned, upon tender by the plaintiff to the defendant of a duly executed deed in the form hereto annexed, sufficient to convey said premises in accordance with the terms of said agreement.

2. That upon said tender by the plaintiff to the defendant, the defendant shall also duly execute and deliver to the plaintiff the bonds and mortgages described in the said agreement, a copy of

⁸⁸. This form is adapted from that used in *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313.

which is annexed to the decision herein marked Exhibit "A," in the form as hereto annexed, said bonds and mortgages to be dated the 25th day of October, 1916, and to bear interest from that date, and the defendant shall also pay to the plaintiff the cost of drawing said mortgages and the cost of recording thereof, and the mortgage taxes and the United States Revenue Stamp Taxes thereon, and the defendant shall also repay to the plaintiff any and all sums paid by the plaintiff since the 25th day of October, 1916, for taxes which became liens on the said real estate subsequent to the 25th day of October, 1916, together with interest on the said payments from the date of the making of the respective payments by the plaintiff to the date of the said tender by the plaintiff, except one-half of the second half of the annual taxes for the year 1916.

3. That upon said tender by the plaintiff to the defendant, the defendant shall also pay to the plaintiff the amount of the costs and disbursements of this action as taxed by the clerk of this court.

4. That if the defendant shall fail or refuse to accept the said deed and duly execute and deliver the said bonds and mortgages and make all of said payments hereinbefore mentioned and referred to, plaintiff shall, in addition to its right to proceed by way of contempt proceedings to enforce this decree and judgment and the provisions thereof, be entitled to file the said deed with the clerk of this court, and the said clerk is directed thereupon to issue to the plaintiff or its attorneys a receipt for the said deed.

5. That upon the presentation of the receipt showing the filing of said deed with the clerk of this court and a request to docket a judgment for the amount of all of the said sums herein provided to be paid by the defendant to the plaintiff upon tender of the said deed, with interest thereon to the date of the docketing of the said judgment in favor of the plaintiff herein and against the defendant herein.

6. That the counterclaim of the defendant herein, be and the same hereby is dismissed on the merits.

7. That either party to this action may apply at the foot of this judgment and decree for such further relief as may be proper.

8. That the plaintiff in addition to its right to proceed by way of contempt proceedings to enforce this decree and judgment, have execution against the defendant herein for the amount for which judgment shall be docketed as aforesaid.

Enter,

H. D. H.,
Justice of the Supreme Court
of the State of New York.

2. Another form in action by vendor.⁸⁹**SUPREME COURT—WASHINGTON COUNTY.**

ALBERT W. HARRIS,	} Plaintiff,
<i>vs.</i>	
ALEX P. SHORRELL and GEORGE V. STOUKAS,	
	} Defendants.

The issues in this action having been regularly brought on for trial before Mr. Justice C. C. Van Kirk, at a Trial Term of this Court, held in and for the County of Washington at the Court House in the Village of Salem, N. Y., on the 13th day of September, 1918; and the plaintiff having appeared by Rogers and Sawyer, his attorneys, and the defendants having appeared by Chambers & Finn, their attorneys; and the Court having heard the allegations and proofs of the parties; and after due deliberation, having duly made and filed its decision on the 21st day of November, 1918, containing a statement of the facts found and the conclusions of law thereon, and directing judgment as hereinafter stated; and the plaintiff's costs having been duly adjusted at the sum of eighty-three and 57/100 dollars (\$83.57.)

Now on motion of Rogers & Sawyer, attorneys for the plaintiff, it is

Adjudged, that the plaintiff, Albert W. Harris, recover of the defendants, Alex P. Shorall and George V. Stoukas, the sum of four thousand seven hundred and seven dollars (\$4,707) together with eighty-three and 57/100 dollars (\$83.57) costs and disbursements, as taxed by the Clerk, amounting in all to the sum of four thousand seven hundred ninety and 57/100 dollars (\$4,790.57), and that plaintiff have execution therefor.

And it is further adjudged, that defendants be and they hereby are compelled to accept the deed of the following described premises tendered to them by the plaintiff on February 15, 1918, viz:

(Here follows description.)

And, it is further adjudged, that the defendants, Alex P. Shorall and George V. Stoukas execute and deliver to the plaintiff Albert W. Harris their mortgage upon said premises, which said mortgage shall provide for the payment by the defendants to the plaintiff of the sum of one thousand dollars (\$1,000) and interest thereon from February 15th, 1918, on the 15th day of February, 1920, or as soon prior thereto as the defendants may desire to pay the same.

And it is further adjudged, that if defendants within a period of 30 days after the service of the judgment herein with notice of

⁸⁹. This form was adapted from that used in *Harris v. Shorall*, 230 N. Y. 343.

entry thereof, or within ten days after the service of any judgment on appeal with notice of entry thereof, shall elect to do so, instead of the mortgage for one thousand dollars (\$1,000) referred to in the last preceding paragraph, they may execute and deliver to the plaintiff their mortgage on the premises conveyed as security for the payment by the defendants to the plaintiff of the sum of eleven thousand dollars (\$11,000) with interest thereon from February 15, 1918, on the 15th day of February, 1920, and in case the defendants elect to give the mortgage for eleven thousand dollars (\$11,000) last mentioned, then and in that event, plaintiff shall within thirty days and before said last mentioned mortgage shall be recorded or take effect, pay the existing mortgage on the premises held by the Albany City Savings Institution and procure and file in the Washington County Clerk's Office a discharge of said mortgage.

G. W. CURRY,
Clerk.

3. Action to enforce agreement for testamentary disposition.⁹⁰

SUPREME COURT—WASHINGTON COUNTY.

SARAH MIDDLEWORTH, Plaintiff,

vs.

MARY M. ORDWAY, *et al.*, Defendants.

This action coming on for trial before the Court at a Trial Term of the Supreme Court, held at the Court House in the Village of Sandy Hill, Washington County, N. Y., on the 24th day of October, 1905, upon the issues joined on the complaint and joint answer of the defendants; and defendant at the beginning of the trial, having asked permission to file an amended answer, was permitted to do so, and the issues were then joined on the complaint and amended joint answer of the defendants; and the trial having been had before the Court on that day; the testimony upon the issues made; and at the close of the trial the Court having reserved its decision, and briefs having been submitted, and after hearing the counsel for the respective parties, and due deliberation had thereon; and the decision and findings of the Court having been duly made for the plaintiff and filed, wherein the Court finds as follows:

(Here follow the conclusions of fact and conclusions of law, at length, as contained in decision.)

Now on motion of Erskine C. Rogers, attorney for the plaintiff, it is,

Adjudged, that the plaintiff is entitled to the specific performance

^{90.} This form is adapted from that used in *Middleworth v. Ordway*, 191 N. Y. 404.

of the contract found in the first and second conclusions of fact as against the collateral heirs and next of kin of James M. Ordway, deceased, but not as against his widow.

And it is further adjudged, that plaintiff is the owner in fee simple of the lands and tenements of which James M. Ordway, died, seized and possessed, subject to the dower rights of the defendant, Mary M. Ordway, and the other defendants are hereby directed to execute and deliver to the plaintiff, a conveyance of said premises as heirs at law of James M. Ordway, deceased, in which their wives, if any, shall join.

And it is further adjudged, that plaintiff is entitled to a one-half part of the personal property of which the said James M. Ordway, died, possessed after the payment of his debts and expenses of administration; and that said defendant, Mary M. Ordway, as administratrix of the goods, chattels and credits of James M. Ordway, deceased, account and pay over to the plaintiff, such share of said personal property.

The following is a description of the lands and premises affected by this judgment and hereinbefore mentioned:

(Here follows a description of the premises.)

E. H. SNYDER,
Clerk.

4. Action to compel transfer of stock.⁹¹

SUPREME COURT—ERIE COUNTY.

EDNA P. WADDLE, as Administratrix of the Estate of CURTICE H. WADDLE, deceased, <div style="text-align: right;">Plaintiff.</div> <div style="text-align: center;">vs.</div> OLIVER CABANA, JR., Defendant.	}
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The issue in this action joined by the answer of the defendant having been brought on for trial on the 3rd day of July, 1914, at a Trial Term of this court held without a jury, before Hon. Harry E. Taylor, one of the justices of this court, Carlton E. Ladd, Esq., appearing on behalf of the plaintiff, and E. G. Mansfield, Esq., and Daniel J. Kenefick, Esq., appearing on behalf of the defendant, and the proofs and allegations of the parties having been heard, and the court having thereafter made and filed a decision directing this judgment, and the costs having been taxed at the sum of \$131.12; Now, on motion of Carlton E. Ladd, Esq., attorney for the plaintiff, it is

⁹¹. This form is adapted from that used in *Waddle v. Cabana*, 220 N. Y. 18.

Ordered and adjudged, that the defendant sell and transfer to the plaintiff one hundred shares of the capital stock of the Buffalo Specialty Company subject to the right of the defendant to hold the same as collateral security, as provided in the agreement set forth and described in said decision; and that the said defendant be and he hereby is required to credit on the annual payments to be made by the plaintiff under the terms of said agreement, all dividend moneys which have accrued on said stock since the 1st day of August, 1912, with interest, and it is further,

Ordered and adjudged, that the plaintiff, Edna P. Waddle, as administratrix of the estate of Curtice H. Waddle, deceased, recover of the defendant, Oliver Cabana, Jr., the sum of one hundred and thirty-one dollars and twelve cents (\$131.12) costs as taxed, and have execution therefor.

Judgment signed this 15th day of December, 1914.

C. W. CHAPIN,
Deputy Clerk.

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INDEX

INDEX

[References are to pages.]

A

Abandonment	PAGE
trade-mark, of	265
Abatement	
purchase price, of, in action of specific performance	757
Abatement and revival	
accounting, in	79
reformation, in	489
Absence of legal remedy	
(See "Adequate Remedy at Law.")	
Abutting owners	
(See also "Streets and Highways.")	
Accident	
specific performance, as defense to	678
Accounting	
abatement and revival	79
accounts stated as defense	9, 10
in general	9
what constitutes an account stated	10
attack on account stated	10
adequate remedy at law as defense	12
agreement in restraint of trade	13
appeals	95
attorney at law, by	53
attorney in fact, by	52
bailor and bailee, between	60
bill of particulars	71
brokers, by	52
bulk sales law, under	46
burden of proof before referee	91
cemetery association, by	57
chattel mortgagee, by	58
committee, by	44
common law action of	4

Accounting—Continued	PAGE
complaint in	66
forms of complaint	72, 77
constructive trustee, by	46
co-owners of personal property, between	38
corporate officers, by	54
corporation to stockholders	55
costs in	96
counterclaims in	7, 70
creditors' committee, by	56
damages for breach of partnership agreement	27
decision, form of	83
debtor and creditor, between	57, 58
director, by	54
distribution of partnership property	24
division of profits or losses of partnership	29
examination before trial	80
executor or administrator, by	43
factor, by	52
fiduciary or trust relation required	14
final judgment	93
former judicial accounting as defense	11
fraudulent transfer of partnership property	23
function of court, jury or referee	82
general assignee, by	45
guardian, by	44
illegality of transaction as defense	13
illegal partnership	20
implied trustee, by	46
insurance company to policy holder	55
interest to members of partnership	29
interlocutory judgment	84-87
in general	84
relief granted as of time of trial	87
form of interlocutory judgment	87
joinder of causes of action	67
joint adventurers, between	32-36
in general	32
action for dissolution and accounting	34
good faith between parties	34
parties	35
judgment creditor's action, in	4
jurisdiction of courts	7
lashes as defense	63
landlord and tenant, between	61
liquidating officers of corporation, by	56
lis pendens, in	7
master and servant, between	59
nature of action	6
necessity of demand before suit	8

Accounting—Continued

	PAGE
necessity of balance due plaintiff.....	8
partners, between.....	15
remedy at law.....	15
action in equity.....	16
effect of account stated.....	18
when partnership exists.....	19
illegal partnership.....	20
stockholders as partners.....	21
dissolution by act of partner.....	21
dissolution by decree of court.....	22
establishment of partnership.....	23
rescission of articles of partnership.....	23
sale of partner's interest rescinded.....	23
fraudulent transfer of partnership property.....	23
distribution of partnership property.....	24
debts due to partner from partnership.....	24
partner wrongfully appropriating assets of firm.....	25
secret profits.....	26
allowance of damages for breach of agreement.....	27
services and expenses winding up partnership.....	28
capital returned to partners.....	28
allowance of interest to partner.....	29
division of profits or losses.....	29
partnership books.....	30
by whom action maintained.....	31
parties defendant.....	32
partnership books.....	30
pleadings in.....	66-77
complaint.....	66
joinder of causes of action.....	67
variance.....	67
sustaining complaint as an action at law.....	69
counterclaim.....	70
bill of particulars.....	71
form of complaint in accounting between co-tenants.....	72
form of complaint as between partners.....	73
form of complaint in action against agent.....	77
principal and agent, between.....	49-54
in general.....	49
broker.....	51
factor.....	52
attorney-in-fact.....	52
attorney and client.....	53
real-estate agent.....	54
proceedings before referee.....	90-93
procedure before referee.....	90
power of referee.....	91
burden of proof.....	91

Accounting—Continued		PAGE
misconduct by referee.....		92
report of referee.....		93
promoter, by.....		55
real-estate agent, by	53,	54
real-estate mortgagee, by.....		59
receivership in.....		88
redemption, in action of.....		419
relation authorizing.....	14—	62
report of referee.....		93
resulting trustee, by.....		47
royalties, of.....		62
salesman, to.....		60
secret profits of partner.....		26
specific performance, in action of.....	759—	763
in general.....		759
value of use and occupancy.....		760
interest to vendor.....		761
interest to purchaser.....		762
depreciation in property.....		762
accounting by purchaser for use of premises.....		763
accounting for proceeds of sale to third person.....		763
statement of accounts as defense.....		9
statute of limitations.....		63
stockholders as partners.....		21
syndicate, by.....		56
tenants by the entirety, between.....		38
tenants in common, between.....		36
testamentary trustee, by.....		43
thief, by.....		46
treasurer, by.....		45
trial of issues.....	81—	83
issues involved.....		81
court, jury or referee.....		82
form of decision.....		83
trustee, by.....	40—	47
in general.....		40
testamentary trustee.....		41
executor or administrator.....		43
committee.....		44
guardian and ward.....		44
assignee for creditors.....		45
treasurer of fund.....		45
implied trustee.....		46
parties.....		47
trustee <i>de son tort</i> , by.....		46
unincorporated associations, by.....		57
variance.....		67
vendor and purchaser, between.....		62
venue of.....		81

Accounts

PAGE

(See "Accounting.")

Account stated

attack on	10
defense to accounting	9, 10
in general	9
what constitutes an account stated	10
attack on account stated	10
fraud in	18
joint adventurers, between	33
partners, between	18
rescission of, between partners	18
what constitutes	10

Acquiescence

(See also "Waiver.")

injunction, as defense to	112
restrictive covenant, in violation of	149
rescission, as defense to	526

Acreage

reformation of error in conveyance	455
--	-----

Action of account

(See "Accounting.")

Additional allowance

costs, in action of accounting	97
injunction	350
specific performance	604, 768

Adequate remedy at law

accounting, as defense to	12
injunction	106
interpleader	360
reformation	438
rescission	506
specific performance	685
pleading of	723
trespass, for	166

Adoption

specific performance of agreement to adopt	616
--	-----

Adverse possession

(See also "Limitation of Action.")

title by, in specific performance	703
---	-----

Advertising

PAGE

(See "Right of Privacy.")

Advertising contracts

enforcement of, by injunction..... 164

Affidavits

order of interpleader, for..... 381

preliminary injunction, answer containing denial..... 331

preliminary injunction, opposing affidavits..... 331

Affirmative covenants

(See "Contracts.")

Agency

(See "Principal and Agent.")

Agent

(See also "Principal and Agent.")

accounting by 49-54

fraud of, as ground for rescission..... 542

reimbursement of, by principal..... 50

Alteration

defense to reformation 470

Ambiguity

reformation, as ground for..... 452

Amendments

(See also "Variance.")

complaint in reformation..... 477

specific performance, in..... 725

Animals

trespass by, injunction as remedy..... 174

Answer

(See also "Pleadings.")

counterclaim in accounting..... 70

injunction, in..... 309

interpleader, in 362

specific performance, statute of frauds..... 655

Ante-nuptial contracts

(See also "Husband and Wife.")

statute of frauds..... 652

specific performance of..... 612

Apartment house

PAGE

restrictive covenant forbidding.....153, 156

Appeals

accounting, in..... 95
 injunction, action of.....347-349
 injunction as substitute for..... 232
 reformation, action of..... 495
 specific performance, in.....740-741
 statutes..... 740
 effect of statutes..... 741
 action of appellate court..... 741
 review of discretion..... 684
 temporary injunctions pending..... 328

Appellate Division

accounting, in action of..... 95
 injunction, in action of..... 347
 reformation, in action of..... 495
 specific performance, in action of..... 741

Apprenticeship

not enforced by injunction..... 121

Arbitration

injunction to enforce..... 248
 reformation of award..... 453
 specific performance of..... 609

Arrest

injunction to prevent illegal..... 252
 order of, in action of rescission..... 589

Artist

contract of, enforced by injunction..... 122

Assessments

(See also "Taxation.")

allowance of, in redemption..... 421

Assignee for creditors

(See "General Assignee.")

Assignment

equity of redemption, of..... 406

Athletes

contract of, enforced by injunction..... 124

Attorney and client	PAGE
accounting by attorney.....	53
rescission of contract between.....	556
Attorney in fact	
accounting by.....	32
Auctions	
use of "puffers".....	634
Auditor	
common law action of accounting.....	5
Automobiles	
(See also "Garages.")	
reformation of insurance policies.....	469
trade-name of.....	273
B	
Bailee	
(See "Bailment.")	
Bailiffs	
accounting of.....	4
Bailment	
accounting between bailor and bailee.....	60
interpleader by bailee.....	356, 376
Bailor	
(See "Bailment.")	
Ball players	
contract of, enforcement by injunction.....	125
Bank	
liability for wrongful act of trustee.....	46
interpleader by.....	356, 376
Barns	
restrictive covenants against.....	157
Beach	
injunction for protection of.....	173
Beneficiaries	
(See also "Trusts.")	
action of accounting by.....	40
parties to accounting.....	47
specific performance by.....	713

Bill boards	PAGE
protection of, by injunction.....	180
on roof	158, 174
Bill of particulars	
accounting, in	71
specific performance, in	726
Bills of sale	
reformation of	461
Blasting	
injunction as remedy	178
Bonds	
(See also "Undertakings.")	
injunction as remedy	162
order of interpleader in action on.....	375
reformation of	459
rescission of	510
specific performance of contract relating to.....	623
Books	
partnership, of	30
reformation of entries	453
Boycotts	
defined	294
injunction against	294
preliminary injunction against	326
Bridges	
injunction as remedy	193
Brokers	
accounting of	49-54
account stated	10
order of interpleader by.....	379
Building covenants	
(See also "Restrictive Covenants.")	
Bulding contracts	
specific performance of	613, 638
Buildings	
encroachments forbidden by injunction.....	170

Bulk Sales Law	PAGE
accounting under	46
Burden of proof	
accounting before referee.....	91
evidence to show defeasance.....	396
reformation, in	497
specific performance, in	684
Burglary insurance	
(See also "Insurance Companies.")	
reformation of policy	468
Burial	
right of, protected by injunction.....	301
C	
Cancellation	
(See "Rescission.")	
Capital	
partners, of, repayment of.....	24, 28
Cattle	
(See "Animals.")	
Cemeteries	
accounting by	57
burial rights protected by injunction.....	301
Certainty	
contract, of, for specific performance.....	656
Cestui que trust	
(See "Trusts.")	
Chattel mortgage	
accounting by mortgagee	58
injunction against foreclosure.....	215
redemption of	401
rights of parties	401
specific performance of agreement to give.....	623
Children	
(See "Parent and Child.")	
Choses in action	
specific performance of contracts relating to.....	623

Cities

PAGE

(See "Municipal Corporations.")

City Court of New York

jurisdiction of accounting.....	7
jurisdiction of reformation	437
jurisdiction of rescission	506
jurisdiction of redemption	390
order of interpleader in	380

Claims

interpleader of	352
-----------------------	-----

Client

(See "Attorney and Client.")

Collection

taxes, injunction to prevent.....	211
-----------------------------------	-----

Collusion

interpleader, as defense to.....	360, 374
----------------------------------	----------

Committee

accounting, by	44
creditors, accounting by	56

Common carriers

order of interpleader by.....	376
-------------------------------	-----

Common law

action of accounting	4
----------------------------	---

Competition

(See "Unfair Competition.")

Complaint

action of accounting	66
forms of	72, 77
joinder of causes.....	67
injunction, action of	307
interpleader, in	362
redemption, in	410-416
in general	410
form of complaint to redeem from chattel mortgage.....	410
another form complaint to redeem from chattel mortgage.....	412
form of complaint in action by wife.....	414
form of complaint in action to declare a deed as a mortgage.....	416
reformation, in action of	476-484

Complaint—Continued	PAGE
in general	476
joinder of causes	477
amendment	477
form of complaint for reformation of deed.....	478
form of complaint for reformation of deed on ground of deficiency of average	480
form of complaint for reformation of fire insurance policy.....	482
another form of complaint to reform fire insurance policy.....	484
rescission, action of	580-585
essential allegations of complaint.....	580
joinder of causes of action.....	582
variance	583
counterclaim . . .	584
form of complaint in action to cancel a separation agreement.....	584
form of complaint in action to cancel contract for sale of land....	596
specific performance, in	721, 726
supplemental, for order of interpleader.....	387
 Condemnation	
injunction against proceeding	246
 Conditions	
enforcement of, by injunction.....	165
 Conduits	
injunction for protection of.....	180, 193
 Consideration	
inadequacy of, as ground for rescission.....	568
as defense to specific performance.....	680
want of, as ground for rescission.....	567
want of, as defense to specific performance.....	669
 Construction contracts	
reformation of	462
specific performance of	613, 638
 Constructive fraud	
reformation, as ground for	448
 Constructive trustee	
accounting by	46
 Contempt	
enforcement of judgment in action of injunction.....	345
specific performance, to enforce judgment of.....	766

Contracts

	PAGE
advertising, injunction as remedy.....	164
breach of, as ground for rescission.....	563-566
in general	563
oral stipulation not included in written agreement.....	565
contracts for support of grantor.....	566
competition on sale of business, injunction as remedy.....	134-138
general rule	134
reasonableness of restriction	136
monopoly	136
damages	136
provision in contract for stipulated damages.....	137
what constitutes a violation.....	137
by whom enforced	138
conditions in, enforcement by injunction.....	165
conduct of employee after termination of employment, injunction as remedy	128
construction, reformation of	462
enforcement of, by injunction.....	112-166
in general	112
analogy to specific performance of contracts.....	114
uncertainty of contract	116
inequity; mutuality	116
contract terminated before trial.....	117
performance by plaintiff	118
contract for personal service.....	118
contract regulating conduct of employee after termination of employment	128
contract against competition on sale of business.....	134
restrictive covenant as to use of property.....	139
leases	157
negotiable instruments	162
sales	163
advertising contracts	164
conditions in grant or contract.....	165
municipal contracts	166
illegal, not enforced by injunction.....	126
inadequacy of consideration as ground for rescission.....	568
inequity of, as defense to injunction.....	116, 126
labor unions, with, injunction to prevent violation.....	289
municipal, enforcement by injunction.....	166
mutuality lacking, as defense to injunction.....	116, 126
oral, not reformed	437
performance of, by plaintiff, as affecting injunctive relief.....	118
personal services, for, injunction to enforce.....	118-127
in general	118
services within rule	121
actors, actresses, etc.	123
athletes	124
necessity of negative covenant.....	125

Contracts—Continued	PAGE
effect of stipulated damages.....	125
contract illegal, inequitable, lacking mutuality.....	126
performance by plaintiff	126
competitor a party defendant.....	127
action by employee	127
preliminary injunction to restrain violation.....	325
reformation of	436-497
rescission of	503-595
specific performance of illegal.....	634
termination of, before trial, as defense to injunction.....	117
uncertainty of, as defense to injunction.....	116
want of consideration, as ground for rescission.....	567
when time of the essence.....	688
 Conversion	
partnership assets, of	25
 Conveyances	
(See also "Deeds"; "Contracts.")	
rescission of	508
 Co-owners	
accounting between	38
 Copyrights	
infringement of	282
 Corporations	
(See also "Foreign Corporations.")	
accounting by agent.....	51
by cemeteries	57
by creditor's committee	56
by liquidating officers	56
by officers	54
by promoters	55
by syndicate	56
to stockholders	55
to unincorporated associations.....	57
injunction procured by	304
injunction to enforce corporate duties.....	218-227
municipal corporations	218
public utility corporations	221
religious corporation	225
membership corporations	226
private, injunction against.....	227
membership, injunction against.....	226
monopolies, injunction against.....	284
order of interpleader, in action on bonds.....	375

Corporations—Continued

PAGE

partnership, as	21
private, injunction against.....	227
redemption by receiver	407
reformation of articles of incorporation.....	453
religious, injunction against.....	225
religious, specific performance of contract of.....	636
rescission for ultra vires.....	571
rescission of contract between corporation and director.....	557
rescission of transaction between promoter and stockholders.....	558
rescission of transfer of stock.....	546
right to stock determined in interpleader.....	356
similarity of names	275
specific performance of agreement to incorporate.....	612
specific performance of contract relating to stocks and bonds.....	523

Costs

accounting, in	96
additional allowance in specific performance.....	604, 768
injunction, in	349
interpleader, in	365
order of interpleader, on	386
redemption, in	432
rescission, in	595
specific performance, in.....	767

Co-tenants

(See "Tenants in Common.")

Counterclaims

accounting, in	70
reformation, in	486
rescission, in action of.....	584
specific performance as	608
specific performance, in	746

County Courts

jurisdiction of accounting	7
of reformation	437
of injunction	105
of redemption	390
of rescission	506
of specific performance	606

Court of Appeals

jurisdiction, in action of injunction.....	348
jurisdiction of reformation	495
specific performance, in action of.....	684, 741

Courts	PAGE
injunction against	228-251
in general	228
action as substitute for appeal.....	232
action as substitute for change of venue.....	233
stay of proceedings contrasted.....	233
restraint of equitable action.....	234
multiplicity of suits	235
proceedings in federal courts	237
proceedings in courts of other states.....	238
proceedings in foreign countries.....	241
usurious obligation	241
obligation settled	241
counterclaim or set-off.....	243
surrogate's courts	243
inferior local courts	245
ecclesiastical courts	245
condemnation proceedings	246
summary proceedings	246
ejectment	248
enforcement of arbitration	248
enforcement of judgment	249
use of evidence improperly secured.....	250
parties	251
jurisdiction of accounting	7
of injunction	105
of redemption	390
of reformation	437
of specific performance.....	604-606
 Covenants	
lease, in, enforcement by injunction.....	157
restrictive, enforced by injunction.....	139-157
 Creditors	
partnership, of, payment of.....	24
accounting to	57
 Criminal Law	
injunction to prevent enforcement.....	252
 Cross answer	
interpleader, in	363

D

Damages	
breach of partnership agreement.....	27
covenant against competition on sale of business.....	136
infringement of trade-mark	279

Damages—Continued

PAGE

injunction action, in	340
necessity of, in action of injunction.....	108
redemption, in	423
reformation, in	489, 490
rescission, in	595
restrictive covenants, from.....	143
right of privacy violated.....	300
specific performance, in	749-756
in general	749
impossibility of performance	751
jury trial of issues.....	752
pleading and proof of legal cause of action.....	753
amount of damages	754
recovery of deposit by purchaser.....	755
lien for damages or deposit.....	756
stipulated, effect on injunctive relief.....	125

Dams

injunction to restrain.....	203
-----------------------------	-----

Death

party to action of accounting, of.....	79
--	----

Debtor

accounting by	57
order for interpleader by.....	375

Decision

accounting, in, form of.....	83
reformation, in action of.....	490

Decree

(See "Judgment.")

Deeds

conditions in, enforcement by injunction.....	165
illegal tax, injunction to prevent.....	212
intended as security	394-401
in general	394
parol evidence to show defeasance.....	396
proof required	396
release by grantor of equity of redemption.....	400
effect of conveyance by grantee.....	401
rights of mortgagee	401
reformation of	453-458
in general	453
description of premises	454
acreage	455

Deeds—Continued	PAGE
estate conveyed	456
assumption of mortgage	457
parties	457
restrictive covenants	458
deed given pursuant to judicial sale.....	458
rescission of	508
specific performance, given in.....	744
 Defeasance	
deeds, attached to	394
 Defendants	
(See “Parties.”)	
 Demand	
necessity of, before accounting.....	8
redemption, before suit of	391
 Deposit in court	
interpleader, in	361
order for interpleader, inability to make deposit.....	269
 Deposition	
examination before trial in action of accounting.....	80
 Devisees	
parties to specific performance	716
 Directors	
accounting by	54, 56
rescission of transaction with corporation.....	557
 Discretion	
injunctive relief	109
preliminary injunction	329
order of interpleader	373
reformation, in	439
rescission, in	536
specific performance, in	675-684
in general	675
relief inequitable	677
mistake, fraud, accident, surprise.....	678
inadequate consideration	680
prejudice to public interests.....	681
fiduciaries, incompetents, infants, etc.....	681
plaintiff not having acted in good faith.....	682
change in circumstances after execution of contract.....	682

Discretion—Continued	PAGE
laches of plaintiff	684
burden of proof	684
review by Court of Appeals of discretion of lower court.....	684
Dissolution	
joint adventure, of	34
partnership, of, by act of partner.....	21
partnership, of, by decree of court.....	22
partnership, of, services and expenses in.....	28
Discrimination	
injunction against, by public utility company.....	222
Diversion	
water, of, injunction to prevent.....	197
Documentary evidence	
(See also "Evidence.")	
parol evidence to show defeasance.....	396
partnership books	30
Dower	
(See "Husband and Wife.")	
redemption by dowress	407
Draftsman	
mistake of, as ground for reformation.....	443
Drama	
name of, as trade-mark.....	273
Dry Dock	
injunction to prevent obstruction.....	207
Duress	
rescission on ground of	551
what constitutes	552
Dwellings	
restrictive covenant affecting	152

E

Easements	
injunction for protection of.....	178-181
in general	178
right of way	179

Easements—Continued	PAGE
light, air and view.....	179
sewerage, pipe lines.....	180
bill board	180
party wall	180
unauthorized use of easement.....	181
illegal attempt to assert easement.....	181
marketability of title affected by.....	702
reformation of deeds as to.....	454
 Ecclesiastical courts	
injunctions against	245
 Ejectment	
injunction to restrain action of.....	248
 Election of remedies	
rescission, in, effect of.....	523-526
remedies available	523
what constitutes an election.....	525
effect of election	525
 Electric companies	
(See also "Public Utility Corporations.")	
injunction against	222
 Elevated railroads	
street, in, injunction as remedy.....	189
 Eminent domain	
(See "Condemnation.")	
 Encroachments	
injunction as remedy	170
mandatory injunctions	171
marketability of title affected by.....	702
streets and highways, on, injunction as remedy.....	184
 Equity	
accounting, joint adventurers	33
accounts of cotenants	36
action of accounting	4-96
establishment of partnership	23
injunction	104
interpleader, action in nature of.....	365
interpleader, action of	352-365
reformation	434
rescission, action of	503-595
specific performance	603

Equity of redemption

PAGE

(See also "Redemption.")

protection of, by injunction.....	214
redemption, action of	390
release of	400

Estoppel

rescission, as defense to	526
---------------------------------	-----

Evidence

burden of proof before referee in accounting.....	91
burden of proof to show defeasance.....	396
fraud, of	547
injunction to prevent use of improper.....	250
opinions as to marketability of title.....	704
parol agreement, specific performance of.....	639
parol, to show defeasance.....	396
partnership books as	30
reformation, in action of.....	496
parol evidence	496
burden of proof	497
sufficiency of evidence	497
sufficiency of, contract relating to decedent's estate.....	630
sufficiency of, proof of fraud.....	547

Examination

before trial, accounting, in.....	80
-----------------------------------	----

Executed contracts

reformation of	453
----------------------	-----

Execution

injunction to prevent enforcement of.....	250
specific performance, in	766

Executors or administrators

accounting by	43
action for accounting between joint adventurers.....	35
action of partnership accounting by.....	31
redemption by	406
rescission by	576
revival of action of accounting.....	79
specific performance, by or against.....	715
specific performance of contract relating to decedents estate.....	626

Executory contracts

reformation of	453, 458
title of parties to.....	607

Extra allowances

PAGE

(See "Additional Allowances"; "Costs.")

F**Factor**

accounting of 52

Federal courts

infringement of patents 281

injunction against proceedings in 237

Federal statutes

trade marks and trade names 263

Fences

spite, injunction as remedy 177

Fiduciaries

(See "Trusts.")

Final judgments

(See "Judgments.")

Fire insurance

(See also "Insurance Companies.")

reformation of policies 466

rescission of appraisal 546

Firms

(See "Partnership.")

Flooding

injunction to restrain 208

Foreclosure of mortgage

(See also "Mortgages.")

defective, right of redemption 392

order of interpleader on 375

Foreign corporations

(See also "Corporations.")

jurisdiction over, in action of injunction 105

rescission of contract of 505

specific performance against 605

Foreign countries

injunctions against proceedings in 241

rescission of instrument affecting land in 505

Foreign courts

PAGE

injunction against proceedings in..... 238

Foreign states

rescission of instrument affecting land in..... 505

specific performance as to property in..... 604

Forms

accounting.....72-77

complaint..... 72

decision..... 83

interlocutory judgment..... 87

final judgment..... 94

injunction.....309-319

complaint..... 309

judgment..... 346

order of interpleader..... 386

redemption.....410-416

complaint..... 410

interlocutory judgment..... 426

reformation.....478-484

complaint..... 478

decision..... 490

judgment..... 493

rescission, complaint in..... 584

judgment..... 595

specific performance, complaint..... 726

judgment.....769-773

Franchises

protection of, by injunction..... 286

Fraud

(See "Fraudulent Conveyances"; Statute of Frauds.")

account stated, in..... 18

constructive, as ground for reformation..... 448

evidence of..... 547

impeachment of partnership books..... 31

persons in confidential relations..... 554

rescission of instrument for.....539-547

in general..... 537

misrepresentation not amounting to fraud..... 538

materiality of representations..... 539

falsity of statements.. 540

reliance on representations..... 540

negligence in discovery of fraud..... 540

misrepresentation of law..... 541

statements of future events..... 542

fraud of agent..... 542

Fraud—Continued	PAGE
condition or value of property purchased.....	543
marketability of title.....	545
insurance policies.....	545
transfer of securities.....	546
judgments.....	546
evidence of fraud.....	547
sufficiency of proof of fraud.....	547
rescission of partnership for.....	23
secret profits by members of partnership.....	26
specific performance, as defense to.....	678
specific performance of contract secured by.....	668
specific performance to avoid.....	641
sufficiency of proof of.....	547

Fraudulent conveyances

(See also "Fraud.")

partnership property, of.....	23
-------------------------------	----

G**Garages**

restrictive covenants against.....	157
------------------------------------	-----

Gas companies

(See also "Public Utility Corporations.")

injunction against.....	221
-------------------------	-----

General assignees

accounting by.....	45
partner, of, action of accounting by.....	21
redemption by.....	406

Good will

protection of, by injunction, on sale of business.....	134
--	-----

Guarantee

reformation of.....	463
specific performance of.....	654

Guardian ad litem

rescission by.....	577
--------------------	-----

Guardian and ward

accounting by guardian.....	44
-----------------------------	----

H**Heirs**

parties to specific performance.....	716
--------------------------------------	-----

Highways

PAGE

(See "Streets and Highways.")

Hospital

forbidden by restrictive covenant.....152, 153

Hotel

name of, as trade-mark..... 273

Husband and wife

accounting between as tenants by the entirety..... 38
 agent for each other, as..... 635
 injunction to determine matrimonial status..... 302
 injunction to restrain violation of separation agreement..... 112
 redemption by wife..... 407
 reformation of separation agreement..... 469
 rescission of contract between..... 559
 separation agreement..... 520
 rescission of transaction by wife..... 576
 specific performance of ante-nuptial contract..... 612
 specific performance of separation agreement..... 635
 wife refusing to sign deed, action of specific performance..... 764

I**Ice**

injunction to protect..... 209

Ignorance

reformation, as defense to..... 446

Implied trustee

accounting by 46

Impossibility

performance, of, specific performance as remedy..... 670

Improvements

allowance for, in action of redemption..... 422
 part performance, as..... 647

Inadequacy

consideration, of, as defense to specific performance..... 680

Incompetents

rescission of contracts of..... 561
 rescission of contract, by..... 520
 specific performance against..... 681, 711, 745

Indemnity

PAGE

reformation of bond of.....459, 462

Indians

lands of, protected by injunction..... 170

Infants

(See also "Guardian and Ward.")

rescission of contract of..... 563

specific performance against.....681, 711, 745

Inferior courts

(See also "Courts.")

jurisdiction of reformation..... 437

jurisdiction of redemption..... 390

jurisdiction of specific performance..... 606

order of interpleader in..... 380

Influence

(See "Undue Influence.")

Infringement

trade-marks and trade-names.....263-281

Injunctions

acquiescence as defense..... 112

actors, enforcement of contract of..... 123

adequacy of other remedies..... 106

advertising contracts enforced by..... 164

against proceedings in foreign courts..... 238

animals, trespass by, restrained..... 174

appeals.....347-349

arbitration enforced by..... 248

arrest, to prevent..... 252

artist, against, to enforce contract..... 122

athletes, contract of, enforcement by..... 124

ball player's contract, enforcement of..... 125

beach protected by..... 173

bill board rights protected..... 180

blasting, protection against..... 178

boycotts, against..... 294

bridges, remedy as to..... 193

burial rights protected by..... 301

changed conditions as defense to enforcement of restrictive covenant.... 144

chattel mortgages, injunction against foreclosure..... 215

condemnation proceedings, against..... 246

conditions in grant or contract enforced by..... 165

confiscatory rates imposed on public utility..... 224

continuing trespasses forbidden..... 168

Injunctions—Continued

	PAGE
contract against competition on sale of business.....	134-138
general rule.....	134
reasonableness of restriction.....	136
monopoly.....	136
damages.....	136
provision in contract for stipulated damages.....	137
what constitutes a violation.....	137
by whom enforced.....	138
contract for personal services.....	118-127
in general.....	118
services within rule.....	121
actors, actresses, etc.....	123
athletes.....	124
necessity of negative covenant.....	125
effect of stipulated damages.....	125
contract illegal, inequitable, lacking mutuality.....	126
performance by plaintiff.....	126
competitor as party defendant.....	127
action by employee.....	127
contract regulating conduct of employee after termination of employ- ment.....	128-131
in general.....	128
divulgence of trade secrets.....	129
soliciting customers of former employer; mailing lists.....	131
agreement not to start competing business.....	133
contract terminated before trial.....	117
contract with labor unions; injunction to prevent violation.....	289
corporate duties, enforcement.....	218-227
municipal corporations.....	218
public utility corporations.....	221
religious corporations.....	225
membership corporations.....	226
private corporations.....	227
corporate names, similarity of.....	275
costs.....	349
courts of other states, against proceedings in.....	238
criminal prosecutions, against.....	252
damages in addition to injunctive relief.....	340
damage to highways prevented.....	195
dams, maintenance of.....	203
debt, restraint of action on.....	241
discretion of court.....	109
diversion of water.....	197
drainage of surface waters.....	206
easements, protection of.....	178-181
in general.....	178
right of way.....	179
light, air and view.....	179
sewerage, pipe lines.....	180

Injunctions—Continued

	PAGE
bill board	180
party wall	180
unauthorized use of easement	181
illegal attempt to assert easement	181
ecclesiastical courts, against	245
ejectment action, against	248
electric companies, against	222
elevated railroads in street	189
employee's agreement not to start competing business	133
encroachments on highways prevented	184
encroachments, remedy as to	170
enforcement of contracts by	112-166
enforcement of judgment	345
enforcement of penal laws	251-259
equitable action, when restrained	234
equity of redemption, protection of	214-217
statutory foreclosure of real estate mortgage	214
chattel mortgage	215
pledge	217
evidence improperly secured	250
exclusion from public places	302
exclusive of franchises protected	286
execution, prevention of enforcement of	250
extra allowance of costs	350
Federal courts, against proceedings in	237
flooding lands	203
foreign country, judicial proceedings in	241
gas companies, against	221
ice, protection of	209
illegal tax, protection from	211-213
in general	211
illegal assessment	212
execution of illegal tax deeds	212
local assessments	213
implied restrictive covenants	141
improvement of highways	194
inferior local courts, against	245
illegal contract not enforced by	126
inequitable contract not enforced by	116, 126
irreparable damage as element of jurisdiction	108
judgment, enforcement of, by	249
judgment in action	337-347
injunctive relief in general	337
mandatory injunction	338
damages in addition to injunctive relief	340
legal relief in lieu of equitable relief	342
postponement of operation of injunction	344
enforcement of judgment	345
form of judgment to restrain infringement of trade-name	346

Injunctions—Continued

	PAGE
form of judgment to restrain violation of ordinance.....	347
judicial proceedings, against.....	228-251
in general.	228
action as substitute for appeal.....	232
action as substitute for change of venue.....	233
stay of proceedings contrasted.....	233
restraint of equitable action.....	234
multiplicity of suits.....	235
proceedings in federal courts.....	237
proceedings in courts of other states.....	238
proceedings in foreign countries.....	241
usurious obligation.	241
obligation settled.	241
counterclaim of set-off.....	243
surrogate's courts.	243
inferior local courts.....	245
ecclesiastical courts.	245
condemnation proceedings.	246
summary proceedings.	246
ejectment.	248
enforcement of arbitration.....	248
enforcement of judgment.....	249
use of evidence improperly secured.....	250
parties.	251
jurisdiction of courts.....	105
labor unions, against.....	287-296
laches as defense.....	112, 303
lakes, protection of.....	208
lateral support protected by.....	182
laying out highway.....	194
leases enforced by.....	157-161
in general.	157
enjoyment of premises by tenant.....	158
use by landlord of part of premises not leased.....	160
improper use of premises by tenant.....	160
assignment of lease or subletting by tenant.....	161
damage to freehold by tenant.....	161
legal relief in lieu of equitable relief.....	342
libel, against publication of.....	300
licenses, protection of.....	181
light, air and view protected by.....	179
limitation of action.....	303
literary property, protection of.....	282
local assessments.	213
mailing lists protected.....	131
mail, protected by.....	302
mandatory injunction, when allowed.....	338
violation of restrictive covenant.....	140
matrimonial status determined.....	302

Injunctions—Continued

	PAGE
membership corporation, against.....	226
mines protected by.....	169
monopoly, against.....	284
multiplicity of suits avoided.....	235
municipal contracts, enforcement of, by.....	166
municipal corporation, against.....	218, 306
municipal licenses, protection of.....	217
mutuality, contract lacking, not enforced by.....	116, 126
nature of action.....	104
necessity for the remedy.....	108
negative covenants.....	114
negotiable instruments.....	162
nuisance, against.....	177
forbidden by restrictive covenant.....	155
obstructions to highways prevented.....	182
obstructions to navigation prevented.....	207
offensive business forbidden by covenant.....	155
oral restrictive covenants.....	141
ordinances, attack on illegal.....	257
oyster beds, protection of.....	210
parties to action.....	304-307
plaintiff.....	304
necessary defendants.....	305
proper defendants.....	306
municipality.....	306
state of New York and its officials.....	307
contracts for services.....	127
restrictive covenants.....	150-152
party walls protected by.....	180
patent violation, against.....	281
performance of contract by plaintiff, as affecting injunctive relief....	118
personal property, protection of.....	174
picketing, against.....	291
pleadings in.....	307-319
complaint.....	307
joinder of causes of action.....	308
answer.....	309
form of complaint for trade-mark violation.....	309
form of complaint for violation of building covenant.....	313
form of complaint for trespass on timber lot.....	316
form of complaint to restrain violation of ordinance.....	319
pledge, against enforcement.....	217
police officers, trespass by.....	253
pollution of waters prevented.....	200
ponds, protection of.....	208
postponement of operation of injunction.....	244
preliminary.....	321-334
in general.....	321
breach of contract.....	325

Injunctions—Continued	PAGE
trade-marks and trade-names.....	326
labor unions; strikes; boycott, etc.....	326
mandatory injunction.....	327
when granted pending appeal.....	328
discretion of court.....	329
complaint to state cause of action.....	329
affidavits in support of complaint.....	330
opposing affidavits, answer containing denials.....	331
undertaking.....	332
notice of application for order.....	332
order granting preliminary injunction.....	333
service of order.....	334
enforcement of order.....	334
privacy, right of, protected.....	297-300
statutes.....	297
constitutionality of statute.....	297
rule prior to enactment of statute.....	297
application of statute.....	298
oral consent; estoppel.....	299
damages.....	300
private corporations, against.....	227
public officers, against.....	218-220
public utility corporations, against.....	221-224
service.....	221
unreasonable rates.....	223
confiscatory rates.....	224
operating without preliminaries.....	285
quarries protected by.....	169
railroad on private property.....	173
railroads in highways.....	185
recurring trespasses forbidden.....	168
refrigeration companies, against.....	222
religious corporations, against.....	225
restrictive covenants enforced by.....	139-157
in general.....	139
mandatory injunction for removal of structure.....	140
oral or implied restrictions.....	141
general construction of covenants.....	142
necessity of damage to plaintiff.....	143
stipulated damages in lieu of injunction.....	144
lack of uniformity in development.....	144
effect of changed conditions.....	145
effect of violation by plaintiff.....	147
effect of violations by others.....	148
release or waiver of covenant.....	148
acquiescence of plaintiff; waiver; laches.....	149
by whom enforced.....	150
against whom enforced.....	151
dwellings only.....	152

Injunctions—Continued	PAGE
private dwellings only.....	153
all structures forbidden.....	154
offensive business.....	155
apartment houses.....	156
distance of structure from street line.....	156
barns, stables; garages.....	157
right of way protected by.....	179
roof protected by.....	174
sales, as remedy for breach.....	163
salesman, injunction against, to enforce contract.....	122
sand bank protected by.....	169
separation agreement not enforced by.....	112
sewerage, dumping of.....	172
sewerage lines protected by.....	180
slander, against publication of.....	300
solicitation of former customers prohibited.....	181
specific performance contrasted.....	114, 603
specific performance, in action of.....	764
spite fences, remedy as to.....	177
springs, interference with.....	208
state of New York, against.....	307
statutory foreclosure, against.....	214
stay of proceedings contrasted.....	233
stipulated damages as affecting relief.....	125, 144
street railways in highways.....	187
streets and highways, protection of.....	182-195
strikes, against.....	287
subways, remedy as to.....	192
summary proceedings, to restrain.....	246
Sunday laws, against enforcement of.....	257
Surrogate's courts, against.....	243
taxpayer's action.....	219
telephone and telegraph lines, remedy as to.....	193
telephone companies, against.....	222
timber protected by.....	170
title to public office.....	220
trade marks and trade names, infringement of.....	263-381
federal and state statutes.....	263
property right in trade-marks.....	264
transfer of trade-mark.....	264
abandonment of trade-mark.....	265
what constitutes an infringement.....	265
products not competitive.....	267
injunction as appropriate remedy for infringement.....	268
absence of intention to infringe.....	269
name as trade-mark.....	270
right to use one's own name.....	273
similarity of corporate names.....	275
labels and wrappers.....	277

Injunctions—Continued

	PAGE
color schemes.....	278
fraudulent business not protected.....	278
lashes.....	279
damages.....	279
parties.....	280
circulars, etc., claiming ownership of trade-mark.....	281
trade secrets, restraint of divulgence.....	129
trees protected by.....	195
trespass, against.....	166-175
in general.....	166
mines, quarries; sand banks.....	169
timber.....	170
encroachment.....	170
deposit of materials on private premises.....	172
dumping of sewerage.....	172
construction of railroad on private property.....	173
beach.....	173
roof.....	174
trespass by animals.....	174
damage to personal property.....	174
title of plaintiff.....	175
necessity of establishing title at law.....	175
trial of issues.....	336
uncertainty of contracts sought to be enforced by.....	116
unconstitutional statutes, prevention of enforcement.....	259
underground conduits, remedy as to.....	193
unfair competition, restraint of.....	262-286
in general.....	262
trade-marks and trade-names.....	263
patents.....	281
literary property.....	282
monopolies.....	284
public utility operating without necessary preliminaries.....	285
exclusiveness of franchise.....	286
unreasonable rates by public utility prohibited.....	223
usurious obligation, restraint of action on.....	241
waste, against.....	175
water companies, against.....	222
waters and water courses protected by.....	196-210
in general.....	196
diversion.....	197
pollution.....	200
dams; flooding.....	203
artificial drainage of surface waters.....	206
obstruction to navigation.....	207
subterranean waters; springs.....	208
lakes and ponds.....	208
ice.....	209
oyster beds.....	210

Insanity

PAGE

(See "Incompetents.")

Insurance companies

accounting by, to policy holders.....	55
accounting of agent of.....	50
interpleader by.....	355
order of interpleader by.....	378
rescission of policy.....	533, 545
reformation of policy.....	463-469
in general.....	463
life insurance.....	465
fire insurance.....	466
burglary or theft insurance.....	468
liability insurance.....	469
specific performance of contract.....	611

Interest

allowance of, in action of specific performance.....	761
partners, allowance to.....	29

Interlocutory judgment

accounting, in.....	84-87
in general.....	84
relief granted as of time of trial.....	87
form of interlocutory judgment.....	87
redemption, in.....	426

Interpleader

action in nature of.....	365
answer in.....	362
bailee, by.....	356
banks, by.....	356
complaint in.....	362
costs in.....	365
defendants.....	354
insurance company, by.....	355
issues in.....	363
judgment in.....	363
nature of action.....	354
order of.....	366-387
statute.....	366
history and purpose of statute.....	367
when order is granted.....	368
in general.....	368
actions to which statute applies.....	369
inability of defendant to make deposit.....	369
necessity of third person to have substantial claim.....	370
conflicting claim must relate to same property.....	372

Interpleader—Continued

	PAGE
interest of defendant in controversy.....	372
discretion of court.....	373
collusion.....	374
debtor.....	375
bailee.....	376
bank.....	376
insurance company.....	378
claimants of brokerage commissions.....	379
action of replevin.....	379
power of local and inferior courts.....	380
procedure.....	381
affidavit for order.....	381
notice of application for order.....	382
delay in making application.....	383
the order.....	383
effect of order.....	384
judgment.....	385
costs.....	386
form of order of interpleader.....	386
another form of order.....	386
form of supplemental complaint.....	387
parties.....	361
pleadings in.....	362
real-estate brokers, by.....	356
statutes relating to.....	352-365
temporary injunction in.....	363
warehousemen, by.....	356
when suit in equity maintainable.....	354-361
in general.....	354
claim by two or more persons.....	355
defendants must claim the same thing.....	357
absence of interest in plaintiff.....	357
hazard to plaintiff in determining rightful claimant.....	358
absence of remedy at law.....	360
absence of collusion.....	360
willingness of plaintiff to make deposit in court.....	361

Interpreter

mistake of, as ground for reformation.....	448
--	-----

Intoxicating liquors

sale of, forbidden by restrictive covenant.....	155
---	-----

Intoxication

rescission of contract on ground of.....	562
--	-----

Issues

accounting, in.....	81
interpleader, in.....	363

Issues—Continued**PAGE**

rescission, in	590
redemption, in	418
reformation, in	487
specific performance, in	735, 752

J**Joinder of causes**

accounting, in	67
injunction, in	308
reformation, in	477
rescission, in	582
specific performance, in	726

Joint adventurers

account stated between	33
action at law between	33
action for dissolution, accounting between	34
good faith between parties	34
nature of relation between	32

Joint tenants

accounting of	36
common law action of accounting	5
scope of accounting between	37

Judgments

accounting, in	5
common law action	5
interlocutory	84
final	93
dissolution of partnership	22
injunction, in	337-347
injunctive relief in general	337
mandatory injunction	338
damages in addition to injunctive relief	340
legal relief in lieu of equitable relief	342
postponement of operation of injunction	344
enforcement of judgment	345
form of judgment to restrain infringement of trade-name	346
form of judgment to restrain violation of ordinance	347
injunction to enforce	249
interpleader, in	363
order of interpleader, for	385
redemption, in	419-430
reformation, in	489-493
in general	489
relief in lieu of reformation	490

Judgments—Continued

PAGE

form of decision.....	490
form of judgment.....	493
rescission, in.....	590-595
in general.....	590
relief in addition to rescission.....	591
relief in lieu of rescission.....	592
relief to defendant.....	593
costs.....	595
form of judgment.....	595
rescission of.....	546
right to, determined in interpleader.....	356

Judgment creditors

redemption by.....	407
relief of, in action of redemption.....	424
accounting in action by.....	4

Judicial proceedings

(See "Courts.")

Judicial sales

redemption, in.....	423
specific performance, in.....	763
specific performance to enforce.....	721

Jurisdiction

accounting of testamentary trustee.....	41
action of accounting.....	7
co-tenants, of.....	36
equitable accounting, executor or administrator.....	43
injunction, of.....	105
order of interpleader.....	380
patent infringement.....	281
redemption, of.....	390
reformation, of.....	437
rescission, of.....	506
specific performance, of.....	604-606
property in foreign state.....	604
foreign corporations.....	605
county courts.....	606
surrogates' courts.....	606
inferior courts.....	606

Jury

action of accounting, in.....	82
function of, on trial of action of injunction.....	336
rescission, in.....	590
reformation, in.....	487
specific performance, in.....	735, 752

L**Labor unions**

PAGE

injunction against 326

Laches

action of accounting 63-65
 injunction, as defense to.....112, 303
 trademark infringement 279
 restrictive covenants 149
 redemption, in action of..... 406
 reformation, as defense to..... 471
 rescission, as defense to 529
 specific performance, as defense.....684, 737

Lakes

injunction to protect 208

Landlord and tenant

accounting between 61
 injunction to enforce lease157-161
 in general 157
 enjoyment of premises by tenant..... 158
 use by landlord of part of premises not leased..... 160
 improper use of premises by tenant..... 160
 assignment of lease or subletting by tenant..... 161
 damage to freehold by tenant..... 161
 redemption of lease403, 409
 reformation of lease 461
 specific performance of lease..... 618
 oral lease 649
 specific performance of options..... 668
 summary proceedings, injunction to restrain..... 246
 title to rents determined in interpleader..... 356

Lateral support

injunction as remedy for protection..... 182

Law day

specific performance, in action of..... 691

Leases

(See also "Landlord and Tenant.")

accounting between landlord and tenant..... 61
 injunction as remedy for enforcement.....157-161
 in general 157
 enjoyment of premises by tenant..... 158
 use by landlord of part of premises not leased..... 160
 improper use of premises by tenant..... 160

Leases—Continued

PAGE

assignment of lease or subletting by tenant.....	161
damage to freehold by tenant.....	161
option in, specific performance.....	667
redemption of	403
reformation of	461
specific performance of	618, 660
oral	649
specific performance of oral	649

Liability insurance

(See also "Insurance Companies.")

reformation of policies	469
-------------------------------	-----

Libel

injunction against publication	300
--------------------------------------	-----

Licenses

accounting for royalties	62
injunction as remedy for protection of.....	181
municipal, injunction to protect.....	217
use of trade-mark	264

Lienor

redemption by	407
---------------------	-----

Liens

(See also "Mortgages.")

allowance of, in specific performance.....	747
title unmarketable on account of.....	699

Life insurance

(See also "Insurance Companies.")

reformation of policies	465
rescission of policies	533, 545

Limitation of action

accounting, action of	63-65
adverse possession, marketable title by.....	703
injunction	303
redemption	404-406
statute	404
earlier statutes	404
the short limitation in subdivision 2.....	405
actions to which statute does not apply.....	405
laches	406
reformation	470
rescission	573
specific performance	737

Lis pendens	PAGE
accounting, action of	7
specific performance, in	733
title unmarketable by reason of.....	700
Literary property	
injunction to protect.....	282
Loan commissioners	
redemption of mortgage	391
Local assessments	
(See also "Taxation.")	
injunction to restrain enforcement.....	213
rescission of	512
Local courts	
(See also "Courts.")	
injunctions against	245
jurisdiction of action of rescission.....	506
jurisdiction of redemption	390
jurisdiction of reformation	437
jurisdiction of specific performance.....	606
order of interpleader in.....	380
Losses	
partnership, division of	29
M	
Mail	
injunction to prevent interference.....	302
Mailing lists	
injunction as protection for.....	131
Mandatory injunctions	
(See also "Injunction.")	
diversion of water, against.....	198
encroachment removed by	171
preliminary	327
replacement of materials taken from land.....	170
restrictive covenant enforced by.....	140
when allowed	338
Marketability of title	
(See "Specific Performance.")	

Marriage

PAGE

(See also "Husband and Wife.")

part performance of contract..... 652

Master and servant

accounting between 59
 actor's enforcement of contract by injunction..... 123
 agreement not to start competing business, injunction as remedy..... 133
 boycott, injunction against..... 287
 contract regulating conduct of employee after termination of employment, injunction as remedy..... 128
 injunction as remedy to enforce contract for services..... 118-127
 solicitation of customers of former employer prohibited..... 131
 specific performance of contract for services..... 613
 strikes, injunction against..... 287
 trade secrets protected by injunction..... 129

Mechanics liens

title unmarketable on account of..... 699

Membership corporations

injunction against 226

Mines

injunction for protection of 169
 specific performance of agreement relating to..... 617

Minors

(See "Parent and Child.")

Misrepresentation

(See also "Fraud.")

rescission of instrument for..... 539-547
 in general 537
 misrepresentation not amounting to fraud..... 538
 materiality of representations 539
 falsity of statements 540
 reliance on representations 540
 negligence in discovery of fraud..... 540
 misrepresentation of law..... 541
 statements of future events..... 542
 fraud of agent 542
 condition or value of property purchased..... 543
 marketability of title 545
 insurance policies 545
 transfer of securities 546
 judgments 546
 evidence of fraud 547
 sufficiency of proof of fraud..... 547

Mistake	PAGE
account stated, in	11
coupled with fraud, as ground for reformation.....	447
impeachment of partnership books.....	31
law, of, as ground for reformation.....	451
rescission of partnership for.....	23
referee, by, in accounting	92
reformation for mutual	442, 443
in general	442
mistake of draftsman or scrivener.....	443
mistake of interpreter	444
rescission, as ground for.....	548-551
mutual mistake	548
unilateral mistake	550
mistake of law.....	551
specific performance, as defense to.....	678
unilateral, as ground for reformation.....	444-447
in general	444
ignorance or negligence of party.....	446
mistake, of one party with fraud of other party.....	447
 Mohawk River	
rights of riparian owners.....	198
 Monopolies	
agreement in restraint of trade.....	136
injunction against	284
 Mortgages	
accounting by mortgagees.....	59
allowance of, in specific performance.....	746
alteration of, as defense to reformation.....	470
assumption of, reformation of conveyance.....	457
redemption against mortgagees.....	409
redemption by mortgagees.....	407
redemption of	391-394
protection of equity of redemption.....	391
mortgagee in possession.....	391
defective foreclosure proceedings.....	392
reformation of	460
relief of mortgagee in action of redemption.....	424
rescission of	509
on ground of payment.....	570
right to, determined in interpleader.....	356
specific performance as to.....	619, 658
contract to assign.....	623
contract to give.....	654
statutory foreclosure of, injunction against.....	214
title unmarketable on account of.....	699
waste, protection against, by injunction.....	176

Motor vehicles

PAGE

(See "Automobiles.")

Multiplicity of suits

avoided by injunction..... 235

Municipal corporations

(See also "Streets and Highways.")

contracts of, enforced by injunction..... 166
 diversion of water by..... 199
 injunction against 218, 306
 injunction procured by..... 304
 injunction to restrain enforcement of laws..... 251
 ordinances, enforcement of, by injunction..... 260
 ordinances, injunction to prevent enforcement of illegal..... 257
 permits and licenses, injunction as remedy to protect..... 217
 rescission of bonds..... 511
 specific performance of contracts of..... 636
 streets and highways protected by injunction..... 182-195
 taxpayer's action 219
 title to office, injunction to determine..... 220
 zoning regulations affecting marketability of title..... 701

Municipal Courts of New York

(See also "Courts.")

jurisdiction of action of reformation..... 437
 jurisdiction of specific performance..... 607
 order of interpleader in..... 381

Mutuality

contract, of, for specific performance..... 660-670
 in general 660
 meeting of minds of parties..... 661
 mutuality of remedy..... 665
 unilateral contracts 665
 options 666
 fraud 668
 want of consideration..... 669
 contract cancelled 670

Mutual mistake

(See also "Mistake.")

reformation on account of..... 444
 rescission, as ground for..... 548

Mutual wills

specific performance of contracts relating to..... 32

N

Names	PAGE
trade-marks, as	270

Navigation

(See also "Waters and Watercourses.")	
obstruction to, injunction to prevent	207

Negative covenants

(See also "Contracts.")	
enforcement by injunction	114

Negligence

discovery of fraud, in, as effecting rescission	540
reformation, as defense to	446

Negotiable instruments

injunction as remedy	162
reformation of	459

Newspaper

name of, as trade-mark	272
----------------------------------	-----

Non-residents

jurisdiction of, in accounting	7
jurisdiction over, in action of injunction	105

Notes

rescission of	510
reformation of	459

Notice

application for preliminary injunction	332
--	-----

Notice of pendency

(See "Lis Pendens.")

Nuisances

dumping of sewerage forbidden by injunction	172
injunction against	177
streets and highways, injunction as remedy	182-195
violation of restrictive covenant	155

O**Obstructions**

navigation, to, injunction to prevent	207
---	-----

Officers

PAGE

(See "Public Officers.")

Opinions

(See also "Evidence.")

marketability of title 704

Options

lease, in 667

nature of 667

specific performance of 666

Oral agreements

(See also "Statute of Frauds.")

specific performance of 639-655

in general 639

sufficiency of note or memorandum 639

fraud 641

effect of "parol evidence" rule 644

part performance, in general 644

part performance, what constitutes 646

part performance, entry into possession, improvements, etc. 647

part performance, payment of consideration 650

part performance, services 652

part performance, marriage, separation, etc. 652

part performance by defendant 653

agreement to partition 654

agreement to guarantee 654

agreement to give or discharge security 654

contract for testamentary disposition of property 655

pleading of defense 655

Order

interpleader 366

preliminary injunction 333

Ordinances

(See also "Municipal Corporations.")

enforcement of, by injunction against violation 260

injunction to prevent enforcement 257

zoning regulations affecting marketability of title 701

Oyster Beds

injunction to protect 210

P

Parent and child

rescission of transactions between 560

Parol evidence

PAGE

defeasance shown by	396
reformation, in action of	496
rescission, in	547
specific performance, effect of rule in	644
want of consideration	669

Parties

accounting by trustee	47
contract against competition on sale of business, injunction	138
infringement of trade-mark	280
injunction action, to	304-307
plaintiff	304
necessary defendants	305
proper defendants	306
municipality	306
state of New York and its officials	307
contract for services	127
restrictive covenants	150-152
judicial proceedings	251
interpleader, action of	361
labor unions	295
partnership accounting	31, 32
redemption, action of	405-409
reformation, action of	473-475
plaintiff	473
defendants	474
purchasers in good faith	475
rescission, action of	575-579
plaintiffs	575
defendants, in general	577
bona fide purchasers	579
specific performance, in	712-721
plaintiffs generally	712
defendants generally	713
personal representative of vendor	715
personal representative of vendee	715
heirs, devisees	716
grantee	717
assignee of vendee	718
wife or widow	720
principal or agent	720
purchaser at judicial sale	721

Partition

specific performance of agreement to	616, 654
--	----------

Partnerships

accounting, against whom maintained	31
accounting, by whom maintained	31

Partnerships—Continued

PAGE

books of	30
capital returned to partners	28
common law action of accounting	4
corporation as party to	21
damages for breach of partnership agreement	27
debts due partner from	24
definite term, without	22
dissolution by decree of court	22
dissolution of, act of partner	21
distribution of property of	24
division of profits or losses	29
effect of accounts stated	18
equitable action of accounting	15-32
establishment of	23
expenses and disbursements of partners	24
expulsion of member from	27
fraudulent transfer of property	23
illegality of, effect on accounting	13, 20
interest allowed to members	29
joint adventure contracted	32
receivership of	88
reformation of settlement	453
remedy at law between partners	15
rescission of articles of	23
rescission of transaction between partners	558
rescission of, sale of partner's interest	23
restraint of trade, in	21
secret profits by member	26
services and expenses winding up	28
specific performance of agreement	611
statute of frauds	20
stockholders as partners	21
when partnership exists	19
wrongful appropriation of assets of	25

Part performance

specific performance, effect in	644
---	-----

Party walls

injunction for protection of	180
--	-----

Patents

accounting as to	50
accounting for royalties	62
jurisdiction of state courts to restrain infringement	281
reformation of assignment of	462
specific performance of agreement to assign	623

Patient	PAGE
(See "Physician.")	
Payment	
injunction to restrain action on obligation.....	241
Permits	
municipal, injunction to protect.....	217
Personal property	
injunction as remedy for protection.....	174
specific performance of contract relating to.....	621-623
in general	621
contract to sell.....	621
contract to purchase	622
choses in action	623
Physician	
rescission of contract procured by.....	556
Picketing	
injunction against	291
Place of trial	
(See "Venue.")	
Plaintiff	
(See "Parties.")	
Pleadings	
(See also "Complaint.")	
accounting, action of	66-77
complaint	66
joinder of causes of action.....	67
variance	67
sustaining complaint as an action at law.....	69
counterclaim	70
bill of particulars.....	71
form of complaint in accounting between co-tenants.....	72
form of complaint as between partners	73
form of complaint in action against agent.....	77
injunction, action of.....	307-319
complaint	307
joinder of causes of action.....	308
answer	309
form of complaint for trade-mark violation	309
form of complaint for violation of building covenant.....	313
form of complaint for trespass on timber lot.....	316
form of complaint to restrain violation of ordinance.....	319

Pleadings—Continued

PAGE

rescission, in	580-585
essential allegations of complaint.	580
joinder of causes of action.	582
variance	583
counterclaim	584
form of complaint in action to cancel a separation agreement.	584
form of complaint in action to cancel contract for sale of land.	586
specific performance, in	721-732

Pledge

injunction to restrain enforcement of.	217
redemption of	403

Police officers

injunction to prevent trespass by.	253
--	-----

Policies

reformation of insurance.	463-469
in general	463
life insurance	465
fire insurance	466
burglary or theft insurance.	468
liability insurance	469

Policy holder

(See "Insurance Company.")

Pollution

water, of, injunction to prevent.	200
---	-----

Ponds

injunction to protect.	208
--------------------------------	-----

Post office

injunction to prevent interference with mail.	302
---	-----

Power of attorney

accounting under	52
----------------------------	----

Preliminary injunctions

affidavits in support of.	330
answer containing denial.	331
appeals	348
boycotts, against	326
breach of contract, against.	325
complaint to state cause of action.	329
discretion of court.	329
enforcement of order	334
interpleader, in action of.	363

Preliminary injunctions—Continued	PAGE
labor unions, against.....	326
mandatory.....	327
notice of application for.....	332
opposing affidavits.....	331
order granting.....	333-334
service of order.....	334
enforcement of order.....	334
pending appeal.....	328
reformation, in action of.....	489
rescission, in action of.....	589
service of order.....	334
specific performance, in.....	734
statutes relating to.....	321
strikes, against.....	326
trade-marks and trade-names, against.....	326
undertaking on.....	332
when granted.....	321

Presumptions

(See also "Evidence.")

correctness of partnership books.....	30
---------------------------------------	----

Principal and agent

accounting between.....	49-54
in general.....	49
broker.....	51
factor.....	52
attorney-in-fact.....	52
attorney and client.....	53
real-estate agent.....	54
specific performance of contracts.....	635
parties.....	720

Privacy

right of, protected by injunction.....	297-300
Civil Rights Law, § 50, right of privacy.....	297
Civil Rights Law, § 50, action for injunction and for damages....	297
constitutionality of statute.....	297
rule prior to enactment of statute.....	297
application of statute.....	298
oral consent; estoppel.....	299
damages.....	300

Profits

accounting between joint adventurers.....	35
accounting of, in action of redemption.....	419
partnership, division of.....	24, 29

Promissory notes

PAGE

order of interpleader in action on..... 375

Promoters

accounting by 55

Provisional remedies

(See "Arrest"; "Receivers"; "Temporary Injunctions.")

Public officers

determination of title to office..... 220
 injunction against 218-220, 306-308
 injunction to restrain enforcement of laws.....251-259
 in general 251
 trespass by police officers..... 253
 Sunday laws 255
 attack on illegal ordinances..... 255
 attack on unconstitutional statute..... 259

Public policy

restraint of trade..... 134
 specific performance of contract contrary to..... 634

Public utility corporations

confiscatory rates restrained..... 224
 franchise protected by injunction..... 286
 injunction against 221
 injunction against operation..... 285
 postponement of injunction against..... 344
 unreasonable rates restrained..... 223

Pugilists

contract of, enforcement by injunction..... 124

Purchasers

(See "Vendor and Purchaser.")

Q

Quarries

injunction for protection of..... 169

R

Railroads

elevated, in streets, injunction as remedy..... 189
 highway, in, injunction as remedy..... 185
 specific performance of contracts for transportation..... 638
 trespass on lands forbidden by injunction..... 173

Rates	PAGE
confiscatory, of public utilities, restrained.....	224
public utility, unreasonable, restrained.....	223
Ratification	
rescission, as defense to.....	526
unauthorized contract, of.....	636
Real estate agents	
accounting by53,	54
interpleader by	356
order of interpleader by.....	379
Real property	
accounting between landlord and tenant.....	61
action to determine claim to, distinguished from reformation.....	437
blasting, injunction as remedy.....	178
easement, protection of, by injunction.....	178-181
in general	178
right of way.....	179
light, air and view.....	179
sewerage, pipe lines.....	180
bill board	180
party wall	180
unauthorized use of easement.....	181
illegal attempt to assert easement.....	181
lease, enforcement by injunction.....	157
lease, reformation of.....	461
marketable title of, in specific performance.....	694
reformation of conveyance.....	453
restrictive covenants enforced by injunction.....	139-157
specific performance of contract relating to.....	616-620
in general	616
action by vendor.....	617
leases	618
mortgages	619
conditions	619
lost or defective grant.....	620
statutory foreclosure of mortgage, injunction against.....	214
title of parties to executory contract.....	607
trespass on, injunction as remedy.....	166
Receipts	
rescission of	515
Receivers	
accounting, in	88
accounting of	4
redemption by	407
rescission, in	589

Records

PAGE

partnership, of	30
-----------------------	----

Redemption

absolute conveyance intended as security.....	394-401
in general	394
parol evidence to show defeasance.....	396
proof required	396
release by grantor of equity of redemption.....	400
effect of conveyance by grantee.....	401
rights of mortgagee.....	401
accounting in	419
against whom maintained.....	409
by whom maintained.....	404-406
in general	406
trustee in bankruptcy, assignee for creditors, receiver, etc.....	407
dowress	407
subsequent lienor	407
chattel mortgage, of.....	401
complaint in	410-416
in general	410
form of complaint to redeem from chattel mortgage.....	410
another form of complaint to redeem from chattel mortgage.....	412
form of complaint in action by wife.....	414
form of complaint in action to declare a deed as a mortgage.....	416
costs and charges of defendant allowed.....	421
costs in.....	432
damages	423
demand before suit.....	391
improvements allowed	422
issues in	418
jurisdiction of courts.....	390
laches as defense.....	406
limitation of action.....	404-406
statute	404
earlier statutes	404
the short limitation in subdivision 2.....	405
actions to which statute does not apply.....	405
laches	406
nature of action.....	390
part of premises.....	424
pleadings	410-416
pledge, of	403
real estate mortgage.....	391-394
protection of equity of redemption.....	391
mortgagee in possession.....	391
defective foreclosure proceedings.....	392
relief granted	419-430
in general	419

Redemption—Continued

PAGE

accounting between parties.....	419
rents and profits.....	419
costs and charges of defendant.....	421
improvements by defendant.....	422
time for redemption.....	422
sale of property.....	423
money judgment in lieu of redemption.....	423
reconveyance to plaintiff.....	423
redemption of part of premises.....	424
relief to subsequent lienors.....	424
relief to part owner of equity.....	425
form of interlocutory judgment, redemption of chattel mortgage...	426
form of interlocutory judgment, action by duress.....	427
form of interlocutory judgment, deed as mortgage.....	428
form of final judgment, redemption of chattel mortgage.....	429
form of final judgment, deed as mortgage.....	430
rents and profits, accounting for.....	419
right of	390
sale of property in.....	423
tender before suit.....	391
time for	422
venue of	418

References

accounting, proceedings before referee.....	90-93
procedure before referee.....	90
power of referee.....	91
burden of proof.....	91
misconduct by referee.....	92
report of referee.....	93
action of accounting.....	82

Reformation

abatement and revival.....	489
acreage, of	455
action to determine claim to real property distinguished.....	437
adequate remedy at law.....	438
alteration of instrument as defense.....	470
ambiguity as ground for.....	452
appeals	495
articles of incorporation, of.....	453
assumption of mortgage.....	457
award of arbitrators, of.....	453
bill of sale, of.....	461
bonds, of	459
complaint in action of.....	476-484
in general	476
joinder of causes.....	477

Reformation—Continued

	PAGE
amendment	477
form of complaint for reformation of deed	478
form of complaint for reformation of deed on ground of deficiency of average	480
form of complaint for reformation of fire insurance policy	482
another form of complaint to reform fire insurance policy	484
construction contracts, of	462
constructive fraud as ground for	448
costs in	494
counterclaims in	486
deeds, of	453-458
in general	453
description of premises	454
acreage	455
estate conveyed	456
assumption of mortgage	457
parties	457
restrictive covenants	458
deed given pursuant to judicial sale	458
defense or counterclaim to another action	486
defenses to	470-473
discretion of court	439
draftsman, mistake of	443
evidence in	496
executory contracts for sale of lands	458
fraud of one party, with mistake of other party	447
grounds of	441-452
mutual mistake	442
unilateral mistake	444
mistake of one party with fraud of other party	446
mistake of law	451
ambiguity	452
illegal verbal contracts	470
instruments reformatable	453-470
insurance policies	463-469
in general	463
life insurance	465
fire insurance	466
burglary or theft insurance	468
liability insurance	469
interpreter, mistake of	443
judgment in	489-493
in general	489
relief in lieu of reformation	490
form of decision	490
form of judgment	493
jurisdiction of courts	437
lashes as defense	471
lease, of	461

Reformation—Continued

PAGE

mistake of law as ground for.....	451
mortgages, of	460
mutual mistake, for.....	442, 443
in general	442
mistake of draftsman or scrivener.....	443
mistake of interpreter.....	444
nature of action.....	436
negotiable instruments, of.....	459
new contract not to be made.....	440
notes, of	459
oral contracts, of.....	437
parol evidence, use of.....	496
parties to action.....	473-475
plaintiff	473
defendants	474
purchasers in good faith.....	475
parties to instrument.....	457
partnership settlement, of.....	453
patent, of assignment of.....	462
relief, when unnecessary.....	438
restrictive covenants, of.....	458
scrivener, mistake of.....	443
separation agreements, of.....	469
specific performance, in action of.....	748
statute of limitations.....	470
stenographer, mistake of.....	443
suretyship, contract of.....	462
temporary injunction	489
transfer of securities, of.....	461
trial of issues.....	487
undertaking, of	462
unilateral mistake as ground for.....	444-447
in general	444
ignorance or negligence of party.....	446
mistake, of one party with fraud of other party.....	447
waiver of	473
wills, of	469

Refrigerator companies

injunction against	222
--------------------------	-----

Release

insurance policies, of, rescission of.....	545
restrictive covenant, of.....	148

Religious corporations

injunction against	225
specific performance of contract of.....	636

Remedy

PAGE

(See "Adequate Remedy at Law.")

Rents

(See also "Landlord and Tenant.")

accounting of, in action of redemption.....	419
right to, determined in interpleader.....	356

Repairs

allowance of, in redemption.....	421
----------------------------------	-----

Replevin

order of interpleader in.....	379
-------------------------------	-----

Report

referee, of, in accounting.....	93
---------------------------------	----

Rescission

account stated, of, between partners.....	18
articles of partnership	23
attorney and client, transactions between.....	556
breach of contract as ground.....	563-566
in general	563
oral stipulation not included in written agreement.....	565
contracts for support of grantor.....	566
collateral relatives, transactions between.....	561
complaint to offer restoration.....	521
corporation and directors, transactions between.....	557
costs in	595
discretion of court.....	586
duress as ground for.....	551
election of remedies.....	523-526
remedies available	523
what constitutes an election.....	525
effect of election.....	525
estoppel	526
evidence of fraud.....	547
executors and administrators, by.....	576
fraud or misrepresentation, for.....	539-547
in general	537
misrepresentation not amounting to fraud.....	538
materiality of representations.....	539
falsity of statements.....	540
reliance on representations.....	540
negligence in discovery of fraud.....	540
misrepresentation of law.....	541
statements of future events.....	542
fraud of agent.....	542
condition or value of property purchased.....	543

Rescission—Continued	PAGE
marketability of title.....	545
insurance policies	545
transfer of securities.....	546
judgments	546
evidence of fraud.....	547
sufficiency of proof of fraud.....	547
grounds for	537
fraud or misrepresentation.....	537
mistake	548
duress	551
undue influence	553
transactions between persons in confidential relations.....	554
incompetency	561
infancy	563
breach of contract.....	563
want of consideration.....	567
inadequacy of consideration.....	568
payment	569
usury	571
ultra vires	571
illegality	572
guardian ad litem.....	577
husband and wife, transactions between.....	559
illegality as ground for.....	572
inadequacy of consideration.....	568
incompetent persons, of contract by.....	520, 561
infancy as ground of.....	563
insurance policy, of.....	533
intoxication as ground of.....	562
judgment in	590-595
in general	590
relief in addition to rescission.....	591
relief in lieu of rescission.....	592
relief to defendant.....	593
costs	595
form of judgment.....	595
judgment, of	546
jurisdiction of courts.....	505
laches	529
mistake as ground for.....	548-551
mutual mistake	548
unilateral mistake	550
mistake of law.....	551
mortgage, of	509
municipal bonds, of	511
nature of action.....	504
necessity of relief.....	506-515
adequate remedy at law.....	506
illegality appearing on face of instrument.....	508

Rescission—Continued

	PAGE
illegality as matter of record.....	508
when legality must be shown by holder before enforcement.....	509
mortgages	509
notes and negotiable securities.....	510
municipal bonds	511
special assessments and tax certificates.....	512
fraud	512
usurious loan	514
receipt	515
negotiable instruments, of.....	510
notes, of	509
order of arrest in.....	589
parent and child, transactions between.....	560
partial, not allowed.....	506
parties <i>in pari delicto</i>	534
parties to action.....	575-579
plaintiffs	575
defendants	577
bona fide purchasers.....	579
partners, transactions between.....	558
payment as ground for.....	569
pleadings in	580-585
essential allegations of complaint.....	580
joinder of causes of action.....	582
variance	583
counterclaim	584
form of complaint in action to cancel a separation agreement.....	584
form of complaint in action to cancel contract for sale of land.....	586
promotor and stockholders, transactions between.....	558
provisional remedies in.....	589
purchase of property subject to mortgage.....	533
receipts, of	515
receivership in	589
restoration of benefits received by plaintiff.....	515-523
retention of benefits by plaintiff.....	530, 531
revocation of agreement.....	526
sale of partner's interest, of.....	233
separation agreements, of.....	520
special assessments, of.....	512
specific performance, in action of.....	748, 749
statute of limitations.....	573
sufficiency of proof of fraud.....	547
tax certificates, of.....	512
temporary injunction	589
transactions between persons in confidential relations.....	554-561
in general	554
attorney and client.....	556
physician and patient.....	556
trustee and <i>cestui que trust</i>	557

Rescission—Continued	PAGE
promoters and stockholders.....	558
partners	558
co-tenant	558
husband and wife.....	559
parent and child.....	560
collateral relatives	561
transfer of contract.....	533
transfer of securities.....	546
trial of issues.....	590
trustee and <i>cestui que trust</i> , transactions between.....	557
ultra vires as ground for.....	571
undue influence as ground for.....	553
usurious obligations, of	514, 520, 571
venue of action.....	588
waiver of	526
want of consideration.....	567
 Restaurant	
name of, as trade-mark.....	273
 Restraint of trade	
specific performance of contract in.....	635
injunctions against monopolies.....	284
partnership in	21
 Restrictive covenants	
acquiescence of plaintiff.....	149
against whom enforced.....	151
apartment house, forbidding.....	156
barns, against	157
by whom enforced.....	150
changed conditions, effect of.....	145
damage from violation of.....	143
distance from street line.....	156
garages, against	157
implied	141
interpretation of	141
laches as defense to violation.....	149
lack of uniformity in development.....	144
nuisance, forbidding	155
offensive business prohibited.....	155
oral restrictions	141
reformation of conveyance containing.....	458
release of	148
stables, against	157
stipulated damages in lieu of injunction.....	144
structures, against	154
title unmarketable on account of.....	701
waiver of	148

Resulting trustees	PAGE
accounting by	47
Revival	
reformation, action of.....	489
Rewards	
right to, determined in interpleader.....	356
Right of way	
injunction for protection of.....	179
Riparian owners	
(See “Waters and Watercourses.”)	
Roads	
(See “Streets and Highways.”)	
Roofs	
protection of, by injunction.....	174
Royalties	
accounting for	62
S	
Sales	
(See also “Personal Property”, “Real Property.”)	
covenant for competition on transfer of business.....	134
order of interpleader by purchaser.....	375
Salesmen	
(See also “Master and Servant.”)	
accounting to	60
injunction against, to enforce contract.....	122
Sand banks	
injunction for protection of.....	169
Savings banks	
order of interpleader by.....	376
Scrivener	
mistake of, as ground for reformation.....	443
Secret profits	
joint adventurers, by one of.....	34
member of partnership, by.....	26

Secrets

PAGE

(See "Trade Secrets.")

Securities

(See also "Mortgages.")

reformation of agreement for transfer of.....	461
rescission of	510
specific performance of contract relating to.....	623, 654

Separation agreements

enforcement by injunction.....	112
reformation of	469
rescission of	520, 559
specific performance of.....	635

Service

preliminary injunction, of.....	334
public utility company, injunction to secure.....	221

Services

(See also "Contracts"; "Master and Servant.")

injunction against discontinuance of.....	222
part performance, as, of contract.....	652
specific performance of contract for.....	613

Sewerage

dumping of, injunction as remedy.....	172
---------------------------------------	-----

Shipping

accounting of co-owners of vessels.....	39
---	----

Slander

injunction against publication.....	300
-------------------------------------	-----

Special assessments

rescission of	512
---------------------	-----

Specific performance

abatement of purchase price.....	757
accident as defense.....	678
accounting for damages sustained from delay.....	759-763
in general	759
value of use and occupancy.....	760
interest to vendor.....	761
interest to purchaser.....	762
depreciation in property.....	762
accounting by purchaser for use of premises.....	763
accounting for proceeds of sale to third person.....	763

Specific performance—Continued

	PAGE
additional allowance in.....	604, 768
adequacy of another remedy.....	685
adoption, of	616
adverse possession giving title.....	703
ante-nuptial contracts	612
appeals in	740-741
statutes	740
effect of statutes.....	741
action of appellate court.....	741
arbitrations, of	609
as a defense.....	608
assignee of vendee, by.....	718
bill of particulars.....	726
building contracts, of.....	638
burden of proof.....	684
cancellation of instrument in.....	748
certainty of contract.....	656-660
in general	656
description of premises.....	657
terms of mortgage or other security.....	658
time of closing title.....	659
terms of lease.....	660
change in circumstances after execution of contract.....	682
chattel mortgage, agreement to give.....	623
choses in action, contracts relating to.....	623
conditions	619
consideration, lack of.....	669
construction contracts, of	613, 638
contract cancelled	670
contracts difficult of enforcement.....	637
costs in	767
damages in lieu of specific performance.....	749-756
in general	749
impossibility of performance.....	751
jury trial of issues.....	752
pleading and proof of legal cause of action.....	753
amount of damages.....	754
recovery of deposit by purchaser.....	756
lien for damages or deposit.....	756
decendent's property, contract relating to.....	626-632
in general	626
requirements as to contract.....	627
sufficiency of proof.....	628
parties to contract	628
mutual wills	632
default of performance.....	710
defined	603
devisees, by	716
direction in judgment as to.....	743

Specific performance—Continued

	PAGE
discretion of court.....	675-684
in general	675
relief inequitable	677
mistake, fraud, accident, surprise.....	678
inadequate consideration	680
prejudice to public interests.....	681
fiduciaries, incompetents, infants, etc.....	681
plaintiff not having acted in good faith.....	682
change in circumstances after execution of contract.....	682
laches of plaintiff.....	684
burden of proof.....	684
review by Court of Appeals of discretion of lower court.....	684
easements as affecting marketability of title.....	702
encroachments affecting marketability of title.....	702
encumbrance as rendering title unmarketable.....	699
enforcement of contract in.....	748
enforcement of judgment	766
excuses for delay	691
executors or administrators as parties.....	715
extension of time for performance.....	692
fiduciaries, contract of	681
foreign corporations, against	605
formation of corporation.....	612
form of deed.....	744
fraud as defense	678
fraud, contract procured by.....	668
guaranty, of	654
guarantor, against	717
heirs, by	716
illegal contracts, of	624
impossibility of performance.....	670-674
in general	670
defendant unable to furnish marketable title.....	671
conveyance of property to third person.....	672
performance conditioned on act of third person.....	672
contract partly performable.....	673
performance possible at time of trial.....	673
how question raised.....	674
inadequate consideration.....	680
incidental relief in.....	748
incompetents, contracts of	681, 711, 745
inequity of relief.....	677
infants, contract of.....	681, 711, 745
injunction contrasted.....	114, 603
injunction in	764
insurance, contract of.....	611
interest, when allowed.....	761
intervening parties	714
joinder of causes of action.....	726

Specific performance—Continued

	PAGE
judgment in	742-773
direction as to specific performance	743
incidental relief	748
specific performance as incidental relief in another form of action . .	749
rescission of contract on denial of relief	749
damages in lieu of specific performance	749
abatement of purchase price	757
accounting for damages sustained from delay	759
judicial sale	763
injunction	764
vendor's wife refusing to sign deed	764
enforcement of decree	766
modification of decree	767
costs	767
forms of judgment	769
judicial sale of property in action of	761
jurisdiction of courts	604-606
property in foreign state	604
foreign corporations	605
county courts	606
surrogates' courts	606
inferior courts	606
jury trial in	735, 752
laches as defense	684, 737
law day	691
leases, of	618, 660
lien for damages or deposit	756
limitation of action	737
lis pendens	733
literal performance by plaintiff not required	688
loan, agreement to make	612
lost or defective grants	620
marketable title	694
in general	694
when title of vendor unmarketable	695
title depending on questions of law	697
outstanding incumbrances	699
lis pendens	700
restrictive covenants	701
zoning regulations	701
easements	702
encroachments	702
title from other than vendor	703
title by adverse possession	703
opinions as to marketability	704
waiver of objection to title	705
title marketable at time of trial	705
marriage as part performance	652
meeting of minds of parties	661

Specific performance—Continued	PAGE
mining privileges	617
mistake as defense	678
modification of judgment	767
mortgages, as to	619, 658
assignment of	623
agreement to give	654
municipal corporations, against	636
mutuality of contract	660-670
in general	660
meeting of minds of parties	661
mutuality of remedy	663
unilateral contracts	665
options	666
fraud	668
want of consideration	669
contract cancelled	670
nature of action	604
opinions as to marketability of title	704
options	666
parol evidence rule	644
parties to action	712-721
plaintiffs generally	712
defendants generally	713
personal representative of vendor	715
personal representative of vendee	715
heirs, devisees	716
grantee	717
assignee of vendee	718
wife or widow	720
principal or agent	720
purchaser at judicial sale	721
partition agreement, of	616, 654
partnership agreement	611
part performance, effect of	644, 747
patents, assignment of	623
payment or assumption of encumbrance	746
performance by plaintiff	687-708
in general	687
literal performance not required	688
when time is of essence	688
law day not fixed in contract	689
excuses for delay	689
extension of time for performance	690
place of performance	693
variance between description in contract and in deed	693
title of vendor not marketable	694
payment of purchase price	706
title insurance	707
notice of vendor of defect of title or deed	707

Specific performance—Continued

	PAGE
refusal to accept deed.....	708
tender of performance.....	708
personal property, contracts relating to.....	621-623
in general	621
contract to sell	621
contract to purchase.....	622
choses in action.....	623
place of performance.....	693
plaintiff not having acted in good faith.....	682
pleadings	721-732
defense of statute of frauds.....	655
principal, against	720
property in foreign states.....	604
public interests, prejudice to.....	681
purchaser at judicial sale, against.....	721
railway companies, transportation, contracts for.....	638
real estate, contracts relating to.....	616-620
in general	616
action by vendor	617
leases	618
mortgages	619
conditions	619
lost or defective grant.....	620
reformation of contract in.....	748
refusal to accept deed.....	708
restraint of trade, contract in.....	635
restrictive covenants rendering title unmarketable.....	701
right of action.....	609
seal, effect of	669
securities, agreement to give or discharge.....	654
services, contract for.....	613
services as part performance.....	652
state, against	714
stocks and bonds, contracts relating to.....	623
submission of controversy.....	736
surprise as defense.....	678
temporary injunction in.....	734
tender of performance.....	708
title of parties to executory contracts.....	607
trial of issues.....	735
trustees, by	681
unauthorized contracts, of.....	635
unilateral contracts	665
variance	725
vendor and purchaser, contracts of.....	616
venue in	735
verbal contracts, of.....	639-655
in general	639
sufficiency of note or memorandum.....	639

Specific performance—Continued	PAGE
fraud	641
effect of “parol evidence” rule	644
part performance, in general	644
part performance, what constitutes	646
part performance, entry into possession, improvements, etc.	647
part performance, payment of consideration	650
part performance, services	652
part performance, marriage, separation, etc.	652
part performance by defendant	653
agreement to partition	654
agreement to guarantee	654
agreement to give or discharge security	654
contract for testamentary disposition of property	655
pleading of defense	655
waiver of objection to title	705
when time is of the essence of contract	688
wife, by or against	720
wife refusing to sign deed	764
wills, of	626
zoning regulations affecting marketability of title	701
 Spite fences	
(See “Fences.”)	
 Springs	
injunction to protect	208
 Stables	
restrictive covenants against	157
 State of New York	
injunctions against	307
specific performance against	714
 Statute of frauds	
agreement not to start competing business	135
ante-nuptial contracts	652
partnership agreement	20
pleading of	655
release of equity of redemption	391
restrictive covenants	141
specific performance, as defense to action	639
 Statute of limitation	
(See “Limitation of Action.”)	
 Statutory foreclosure	
injunction against	214

Stay of proceedings	PAGE
injunction contrasted	233
Stenographer	
mistake of, as ground for reformation.....	443
Stipulated damages	
contract against competition on sale of business.....	137
injunction, effect on relief by.....	125
in lieu of injunction to enforce restrictive covenants.....	144
Stock brokers	
accounting of	51
Stockholders	
(See also "Corporations.")	
accounting by corporation to.....	55
interpleader by	367
partners, as	21
rescission of transaction with promoters.....	558
specific performance by.....	713
Stocks	
(See also "Stock Brokers.")	
reformation of agreement for transfer of.....	461
rescission of transfer.....	546
specific performance of contract relating to.....	623
Streets and highways	
bridges, injunction as remedy.....	193
covenant fixing building line.....	156
damage to, prevented by injunction.....	195
encroachments on, injunction as remedy.....	184
laying out of improved, injunction as remedy.....	194
obstructions prevented by injunction.....	182
subways in, injunction as remedy.....	192
telephone and telegraph lines, injunction as remedy.....	193
trees protected by injunction.....	195
underground conduits, injunction as remedy.....	193
Strikes	
injunction against	287
preliminary injunction against.....	326
Submission to controversy	
judgment of specific performance.....	736

Subterranean waters	PAGE
(See "Waters and Watercourses.")	
Subways	
injunction as remedy	192
Summary proceedings	
(See "Landlord and Tenant.")	
injunction to restrain.....	246
redemption of lease.....	403
Sunday	
injunction to prevent enforcement of Sunday laws.....	257
Supplemental complaint	
(See also "Complaint.")	
Supplementary proceedings	
redemption by receiver.....	407
Support	
(See "Lateral Support.")	
Sureties	
reformation of contract of.....	462
Surprise	
specific performance, as defense to.....	678
Surrogate's courts	
accounting by testamentary trustees.....	41
accounting of executor or administrator.....	43
jurisdiction of accounting.....	7
jurisdiction of specific performance.....	606
injunction against	243
Syndicate	
accounting by	56

T

Taxation	
injunction to protect from illegal.....	211-213
in general	211
illegal assessment	212
execution of illegal tax deeds.....	212
local assessments	213
rescission of special assessments and tax certificates.....	512

Taxes

PAGE

allowance of, in redemption..... 421

Taxpayer's actions

injunctive relief 219

Telegraph companies

(See also "Public Utility Corporations.")

injunction against 222

injunction to protect lines..... 193

Telephone companies

(See also "Public Utility Corporations.")

injunction against 222

injunction to protect lines..... 193

Temporary injunctions

(See "Preliminary Injunctions.")

Tenant

(See "Landlord and Tenant.")

Tenants by the entirety

accounting between 38

Tenants in common

accounting of 36

common law action of accounting..... 4

redemption by 425

rescission of contracts between..... 558

scope of accounting between..... 37

specific performance of oral partition..... 654

Tender

redemption, before suit of..... 391

Testamentary trustees

accounting of 41

Theatre

name of, as trade-mark..... 273

Theft insurance

(See also "Insurance Companies.")

reformation of policies..... 468

Thief

accounting, by 46

Timber	PAGE
injunction for protection of.....	170
Time	
when of essence.....	688
Trade-marks and trade names	
abandonment of	265
defined	264
injunction to prevent infringement of.....	263-381
federal and state statutes.....	263
property right in trade-marks.....	264
transfer of trade-mark.....	264
abandonment of trade-mark.....	265
what constitutes an infringement.....	265
products not competitive.....	267
injunction as appropriate remedy for infringement.....	268
absence of intention to infringe.....	269
name as trade-mark.....	270
right to use one's own name.....	273
similarity of corporate names.....	275
labels and wrappers.....	277
color schemes	278
fraudulent business not protected.....	278
laches	279
damages	279
parties	280
circulars, etc., claiming ownership of trade-mark.....	281
name as	270
preliminary injunction to prevent violation.....	326
property right in.....	264
transfer of	264
Trade secrets	
protection of, by injunction.....	129
Treasurer	
accounting, by	45
Trees	
street, in, injunction for protection.....	195
Trespass	
animals, by, injunction as remedy.....	174
beach, injunction as remedy.....	173
continuous, remedy by injunction.....	168
mines protected by injunction.....	169
police officers, by, injunction to prevent.....	253
quarries protected by injunction.....	169

Trespass—Continued

PAGE

railroad on private property, injunction as remedy.....	173
recurring, remedy by injunction.....	168
roof, on, injunction as remedy.....	174
sand bank protected by injunction.....	169
timber protected by injunction.....	170

Trials

accounting, procedure before referee.....	90
injunction, action of.....	336
issues in accounting.....	81
redemption	418
reformation, in	487
rescission, in	590
specific performance, in.....	735, 752

Trust companies

interpleader by	377
---------------------------	-----

Trustee de son tort

accounting by	46
-------------------------	----

Trustees in bankruptcy

action for partnership accounting by.....	31
redemption by	407

Trusts

equitable action, for accounting of trustees.....	40-47
in general	40
testamentary trustee	41
executor and administrator.....	43
committee	44
guardian and ward.....	44
assignee for creditors.....	45
treasurer of fund.....	45
implied trustee	46
parties	47
establishment of, by action.....	40
rescission of agreement between trustee and beneficiary.....	557
rescission of transaction by trustee.....	575
specific performance of contract.....	681

U**Ultra vires**

defense, as, to partnership accounting.....	20
rescission on ground of.....	571

Undertakings

preliminary injunction, for.....	332
reformation of	462

Undue influence

PAGE

rescission on ground of..... 553

Unfair competition

contract against competition on sale of business.....134-138
 general rule 134 -
 reasonableness of restriction..... 136
 monopoly 136
 damages 136
 provision in contract for stipulated damages..... 137
 what constitutes a violation..... 137
 by whom enforced..... 138
 employee's agreement not to start competing business..... 133
 injunction to restrain..... 262
 trade secrets protected..... 129

Unilateral contracts

specific performance of..... 665

Unilateral mistake

(See also "Mistake.")

rescission as ground for..... 548
 specific performance, as defense to..... 678

Unincorporated associations

accounting by 57
 labor unions, injunction against..... 295

Unions

(See "Labor Unions.")

United States Courts

(See "Federal Courts.")

Usury

injunction to restrain action on instrument..... 241
 rescission of instrument.....520, 571

V**Variances**

accounting, in 67
 interpleader, in 361
 rescission, in 583
 specific performance, in..... 725

Vendor and purchaser

accounting between 62
 marketable title in specific performance..... 694
 recovery of deposit in action of specific performance..... 755
 specific performance of contracts..... 616

Venue

PAGE

accounting, in	81
injunction as substitute for change of.....	233
redemption, of	418
rescission, in	588
specific performance, in.....	735

Verbal contracts

specific performance of	639-655
in general	639
sufficiency of note or memorandum.....	639
fraud	641
effect of "parol evidence" rule.....	644
part performance, in general	644
part performance, what constitutes	646
part performance, entry into possession, improvements, etc.....	647
part performance, payment of consideration.....	650
part performance, services	652
part performance, marriage, separation, etc.....	652
part performance by defendant	653
agreement to partition	654
agreement to guarantee	654
agreement to give or discharge security.....	654
contract for testamentary disposition of property.....	655
pleading of defense.....	655

Vessels

accounting of co-owners	39
-------------------------------	----

Villages

(See "Municipal Corporations.")

W

Waiver

objection to marketability of title.....	705
reformation, of	473
restrictive covenant, of	148
rescission, of	526

Walls

(See "Party Walls.")

Warehousemen

interpleader by	356
order of interpleader by.....	376

Warrant of dispossession	PAGE
injunction to prevent execution of.....	246
redemption of	403

Waste	
injunction as remedy.....	175

Water companies	
(See also "Public Utility Corporations.")	
injunction against	222

Waters and watercourses	
artificial drainage of surface waters.....	206
dams, maintenance of	203
injunction to prevent injury.....	196-210
in general	196
diversion	197
pollution	200
dams; flooding	203
artificial drainage of surface waters.....	206
obstruction to navigation	207
subterranean waters; springs	208
lakes and ponds.....	208
ice	209
oyster beds	210
lakes and ponds, injunction to protect.....	208
obstruction to navigation, injunction to prevent.....	207
pollution of, injunction to prevent.....	200
springs, injunction to prevent interference with.....	208

Wills	
reformation of	469
specific performance of	626

Wood	
(See "Timber.")	

Writings	
(See "Contracts.")	

Z

Zoning regulations	
unmarketability of title on account of	701

